(10)

No. 94-1664-CFY
Status: GRANTED

Title: Stacey C. Koon, Petitioner
v.
United States

Docketed:
April 10, 1995

Court: United States Court of Appeals for the Ninth Circuit

Vide:
94-8842

Counsel for petitioner: Olson,Theodore B.

Counsel for respondent: Solicitor General

40 copies ea ptn & sep appdx. NOTE: Order re rehearing & dissenting op. amended 2-2-95.

Entry	Date	Note	Proceedings and Orders
1	Apr 10 1995	G	Petition for writ of certiorari filed.
2	Apr 10 1995		Appendix of petitioner filed.
4	May 3 1995		Order extending time to file response to petition until June 6, 1995.
5	May 30 1995		Order further extending time to file response to petition until June 19, 1995.
6	Jun 19 1995		Brief amicus curiae of Law Enforcement Legal Defense Fund filed.
7	Jun 19 1995		Brief amicus curiae of Village of Hoffman Estates, Illinois filed.
8	Jun 19 1995		Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
9	Jun 19 1995		Brief amicus curiae of National Association of Police Organizations, Inc. filed.
11	Jun 19 1995		Brief of respondent United States in opposition filed. VIDED.
10	Jun 21 1995		DISTRIBUTED. September 26, 1995 (Page 9)
12	Jun 26 1995	X	Reply brief of petitioner filed.
13	Sep 27 1995		Petition GRANTED. limited to Question 1 presented by the petition. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, November 9, 1995. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, December 8, 1995. A reply brief, if any, is to be filed with the Clerk and served upon oposing counsel on or before 3 p.m., Thursday, December 28, 1995. Rule 29.2 does not apply. **********
15	Nov 9 1995		Joint appendix filed. VIDED.
16	Nov 9 1995		Brief of petitioner Stacey Koon filed.
17	Nov 9 1995		Brief amicus curiae of Law Enforcement Legal Defense Fund filed.
18	Nov 9 1995		Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
19	Nov 9 1995		Brief amicus curiae of National Association of Police Organizations, Inc. filed. VIDED.
20	Nov 9 1995		CIRCULATED.
21	Nov 13 1995		Record filed.

2 pp

No. 94-1664-CFY

Entry	Date	Note	Proceedings and Orders
		*	Certified record proceedings U.S. District Court for the Central District of California (2 BOXES - SEALED)
22	Nov 15 1995		Record filed.
		*	Partial record proceedings United States Court of Appeals for the Ninth Circuit.
23	Nov 16 1995		Record filed.
		*	Additional record proceedings U.S. District Court for the Central District of California (12 BOXES - SEALED)
24	Nov 30 1995	D	Motion of petitioner Stacey Koon for divided argument filed.
25	Dec 5 1995	G	Motion of petitioner Laurence Powell for divided argument filed.
28	Dec 8 1995	X	Brief of respondent United States filed. VIDED.
26	Dec 11 1995		Motion of petitioner Stacey Koon for divided argument DENIED.
27	Dec 11 1995		Motion of petitioner Laurence Powell for divided argument GRANTED. and the time is divided as follows: petitioner Koon - 15 minutes; petitioner Powell - 15 minutes.
29	Dec 28 95	X	Reply brief of petitioner Stacy C. Koon filed.
30	Jan 8 1996	G	Motion of counsel for petitioner in No. 94-8842 to reschedule oral argument filed.
31	Jan 8 1996		Motion of counsel for petitioner in No. 94-8842 to reschedule oral argument GRANTED. Oral argument in No. 94-1966, Loving v. United States, will be heard at 11 a.m., Tuesday, January 9, 1996.
14	Jan 9 1996		SET FOR ARGUMENT TUESDAY, FEBRUARY 20, 1996. (3RD CASE).
32	Feb 20 1996		ARGUED.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

STACEY C. KOON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a district court's downward departure from the prescribed range of the United States Sentencing Guidelines based upon factors not expressly prohibited as grounds for departure is to be reviewed under the de novo standard applied by the court below or under the deferential standard set forth in *United States* v. *Rivera*, 994 F.2d 942 (1st Cir. 1993), and other cases.

2. Whether the testimony of a witness exposed to a defendant's compelled statement is admissible under *Kastigar* v. *United States*, 406 U.S. 441 (1972), merely upon a showing that there is an independent source upon which the testimony is based, as held by the court below, or is admissible only if the prosecution also proves that the witness's testimony was not shaped or altered in any way by exposure to the defendant's compelled statement, as held by the District of Columbia Circuit in *United States* v. *North*, 910 F.2d 843 (D.C. Cir.), *modified*, 920 F.2d 940 (D.C. Cir. 1990), *cert. denied*, 500 U.S. 941 (1991), and *United States* v. *Poindexter*, 951 F.2d 369 (D.C. Cir. 1991), *cert. denied*, 113 S. Ct. 656 (1992).

3. Whether Fourteenth Amendment substantive due process is violated in the context of an arrest by merely "objectively unreasonable" force, as held by the court below, or only if the force is "shocking to the conscience" or "intended as punishment" and applied in a custodial setting, as held by other circuits.

4. Whether the federal prosecution of petitioner, after his acquittal by a state court on substantially identical charges, violated the Double Jeopardy Clause of the Fifth Amendment or the Due Process Clauses of the Fifth and Fourteenth Amendments.

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In re Grand Jury Subpoenas Dated December 7 and 8 v. *United States*, 40 F.3d 1096 (10th Cir. 1994), *petition for cert. filed*, 63 U.S.L.W. 3644 (U.S. Feb. 17, 1995) (No. 94-1401)	21

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Koon v. *United States*, 114 S. Ct. 296 (1993)	9
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People v. *Comingore*, 570 P.2d 723 (Cal. 1977)	26
Powell v. *Superior Court*, 283 Cal. Rptr. 777 (Cal. Ct. App. 1991)	4,5,6
Rinaldi v. *United States*, 434 U.S. 22 (1977)	7
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Stanley v. *Illinois*, 405 U.S. 645 (1972)	26
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Swift v. *Tyson*, 41 U.S. (16 Pet.) 1 (1842)	27
Turley v. *Wyrick*, 554 F.2d 840 (8th Cir. 1977), *cert. denied*, 434 U.S. 1033 (1978)	25
United States v. *Alvarez-Cardenas*, 902 F.2d 734 (9th Cir. 1990)	18
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United States v. *North* ("*North II*"), 920 F.2d 940 (D.C. Cir. 1990), *cert. denied*, 500 U.S. 941 (1991)	9,20
United States v. *Poindexter*, 951 F.2d 369 (D.C. Cir. 1991), *cert. denied*, 113 S. Ct. 656 (1992)	9,19,20
United States v. *Reese*, 2 F.3d 870 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 928 (1994)	23
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United States v. *Schmidgall*, 25 F.3d 1523 (11th Cir. 1994)	20
United States v. *Simpson*, 7 F.3d 813 (8th Cir. 1993)	16
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U.S.S.G. § 5K2.0, p.s. 2

U.S.S.G. § 5K2.10, p.s. 2,15,16

Cal. Const., art. I, § 15 26

Cal. Penal Code §§ 656, 793-794 (West 1988) 26

Other Authorities

Ronald J. Allen, *Freedom from Double Jeopardy, Our Lost Liberty*, WALL ST. J., Mar. 17, 1993, at A15 ... 24

Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 COLUM. L. REV. 1 (1995) ..... *passim*

Daniel A. Braun, *Praying to False Sovereigns: The Rule Permitting Successive Prosecutions in the Age of Cooperative Federalism*, 20 AM.J. CRIM. L. 1 (1992) 25

Greg Braxton & Jim Newton, *Looting and Fires Ravage L.A.*, L.A. TIMES, May 1, 1992, at A1 7

Briseno's Attorney Looks Back At Trial, NAT'L L.J., May 17, 1993, at 15 8

Other Authorities (continued) — **Page(s)**

Paul G. Cassell, *The Rodney King Trials and the Double Jeopardy Clause: Some Observations on Original Meaning and the ACLU's Schizophrenic View of the Dual Sovereign Doctrine*, 41 UCLA L. REV. 693 (1994) 24,28

Gregory J. Church, *Cries of Relief*, TIME, Apr. 26, 1993, at 18 7

Michael A. Dawson, Note, *Popular Sovereignty, Double Jeopardy, and the Dual Sovereignty Doctrine*, 102 YALE L.J. 281 (1992) 25

Walter L. Fisher, *Double Jeopardy, Two Sovereignties and The Intruding Constitution*, 28 U. CHI. L. REV. 591 (1961) 25

J.A.C. Grant, *Successive Prosecutions by State and Nation: Common Law and British Empire Comparisons*, 4 UCLA L. REV. 1 (1956) 28

J.A.C. Grant, *The Lanza Rule of Successive Prosecutions*, 32 COLUM. L. REV. 1309 (1932) 25

Harlan H. Harrison, *Federalism and Double Jeopardy: A Study in the Frustration of Human Rights*, 17 U. MIAMI L. REV. 306 (1963) 25

Susan N. Herman, *Double Jeopardy All Over Again: Dual Sovereignty, Rodney King, and the ACLU*, 41 UCLA L. REV. 609 (1994) ..... *passim*

Paul Hoffman, *Double Jeopardy Wars: The Case For a Civil Rights "Exception,"* 41 UCLA L. REV. 649 (1994) 24

Other Authorities (continued) **Page(s)**

Douglas Jehl & Frederick M. Meier, *Bush Arrives in L.A., Calls for Healing*, L.A. TIMES, May 7, 1992, at A1 7

James E. King, Note, *The Problem of Double Jeopardy in Successive Federal-State Prosecutions: A Fifth Amendment Solution*, 31 STAN. L. REV. 477 (1979) 25

Evan Tsen Lee, *The Dual Sovereignty Exception to Double Jeopardy: In The Wake of Garcia* v. *San Antonio Metropolitan Transit Authority*, 22 NEW. ENG. L. REV. 31 (1987) 25

Kenneth M. Murchison, *The Dual Sovereignty Exception to Double Jeopardy*, 14 N.Y.U. REV. L. & SOC. CHANGE 383 (1986) 25

Jack Nelson, *Bush Denounces Rioting in L.A. as "Purely Criminal,"* L.A. TIMES, May 1, 1992, at A9 7

Lawrence Newman, *Double Jeopardy and the Problem of Successive Prosecutions*, 34 S. CAL. L. REV. 252 (1961) 25

Note, *Double Jeopardy and Federal Prosecution After State Jury Acquittal*, 80 MICH. L. REV. 1073 (1982) 25

Note, *Double Prosecution by State and Federal Governments: Another Exercise in Federalism*, 80 HARV. L. REV. 1538 (1967) 25

Other Authorities (continued) **Page(s)**

George C. Pontikes, *Dual Sovereignty and Double Jeopardy: A Critique of Bartkus* v. *Illinois and Abbate* v. *United States*, 14 CASE W. RES. L. REV. 700 (1963) 25

Paul Craig Roberts, *Justice Takes A Double Jeopardy Hit*, WASH. TIMES, May 3, 1993, at 3 24

Richard A. Serrano & Henry Weinstein, *After the Riots: The Search for Answers*, L.A. TIMES, May 7, 1992, at A3 7

Stuart Taylor, Jr., *Repeat Offenses*, AM. LAWYER, Sept. 9, 1992, at 8 24

Bruce A. Terris, *Corruption of Justice in L.A.*, LEGAL TIMES, Apr. 26, 1993, at 22 24

Tracy Wood & Faye Fiore, *Beating Victim Says He Obeyed Police*, L.A. TIMES, Mar. 7, 1991, at A1 5

PETITION FOR WRIT OF CERTIORARI

Stacey C. Koon respectfully petitions this Court for a writ of certiorari to review the judgment in this case of the United States Court of Appeals for the Ninth Circuit.[1]

Petitioner Stacey C. Koon was a Los Angeles Police Department ("LAPD") sergeant present during the arrest of Rodney Glen King. A videotape of a portion of the arrest was repeatedly broadcast on television news programs worldwide, producing "horror and outrage" throughout the world. Within hours of the first broadcast, state and federal officials began working closely together to determine whether to prosecute petitioner for failing to prevent the alleged excessive use of force during the arrest. Federal prosecutors refrained from bringing a prosecution, and petitioner was indicted by state prosecutors. Sergeant Koon was acquitted of all charges. His acquittal precipitated days of massive, destructive rioting in Los Angeles, resulting in fifty-three deaths, injury to hundreds, and property damage of over $1 billion. The federal government then brought a second criminal prosecution and Sergeant Koon was convicted.

Petitioner's sentence of thirty months in prison was appealed by federal prosecutors. The court of appeals affirmed petitioner's conviction but vacated his sentence and ordered him to be resentenced.

Petitioner's prosecution and sentencing present genuinely extraordinary circumstances implicating fundamental issues of due process, double jeopardy and fairness. Moreover, as recognized by nine judges of the court of appeals dissenting from the denial of rehearing en banc, the decision below directly conflicts with *United States* v. *Rivera*, 994 F.2d 942 (1st Cir.

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[1] In the proceeding before the court of appeals, the parties were petitioner and Laurence M. Powell, who were defendants-appellants and cross-appellees, and respondent, which was plaintiff-appellee and cross-appellant.

1993) (Breyer, J.), and other cases on important and recurring issues arising when a district court departs from a prescribed sentencing range under the United States Sentencing Guidelines. This case also raises a substantial issue, on which the lower courts are divided, regarding the requirements under *Kastigar* v. *United States*, 406 U.S. 441 (1972), for the admissibility of the testimony of a witness who has been exposed to the defendant's compelled statement.

OPINIONS AND ORDERS BELOW

The opinion of the court of appeals is reported at 34 F.3d 1416 and reprinted at App. 1a-79a. The court of appeals' denial of the petition for rehearing and suggestion for rehearing en banc and the opinions of the nine judges dissenting therefrom are reported at 45 F.3d 1303 and reprinted at App. 80a-93a. The sentencing opinion of the district court is reported at 833 F. Supp. 769 and reprinted at App. 94a-138a. Excerpts from the district court's unreported order denying petitioner's motion for judgment of acquittal and new trial are reprinted at App. 139a-144a. Excerpts from the district court's unreported orders addressing the *Kastigar* issue are reprinted at App. 145a-164a.

JURISDICTION

The court of appeals issued its opinion on August 19, 1994. On January 12, 1995, the court of appeals denied the petition for rehearing and suggestion for rehearing en banc. This petition is being submitted within the time permitted by the Rules of this Court. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND SENTENCING GUIDELINES INVOLVED

This case involves the Fourth Amendment to the Constitution, the Double Jeopardy and Self-Incrimination Clauses of the Fifth Amendment, the Confrontation Clause of the Sixth Amendment, the Due Process Clauses of the Fifth and Fourteenth Amendments, 18 U.S.C. §§ 242, 3553, and U.S.S.G. §§ 2A2.2, 2H1.1, 2H1.4, 5K2.0, p.s., 5K2.10, p.s., which are set out verbatim at App. 165a-175a.

STATEMENT OF THE CASE

A. Statement of the Facts

1. Rodney King's Arrest

On the evening of March 2, 1991, Rodney Glen King spent several hours drinking malt liquor with two male friends in his wife's parked Hyundai automobile in a suburb of Los Angeles.[2] App. 2a, 96a-97a. They then proceeded to go for a ride, with Mr. King driving. App. 2a, 97a.

Mr. King was intoxicated and speeding along the 210 Freeway towards the San Fernando Valley when California Highway Patrol ("CHP") Officers Melanie Singer and Tim Singer observed Mr. King's vehicle and began pursuit in their CHP cruiser with its red lights flashing and siren activated. App. 2a, 97a. Mr. King's vehicle was traveling in excess of 100 m.p.h. App. 110a.

Mr. King refused to pull his vehicle over, and continued speeding off the freeway and onto surface streets, driving in an erratic fashion. App. 97a-98a. The CHP officers called for assistance, and LAPD Officers Laurence M. Powell and Timothy E. Wind, along with patrol officers from the Los Angeles Unified School District, responded and joined in pursuit of Mr. King's vehicle. App. 2a, 97a. During the chase, the CHP officers ordered Mr. King by loud speaker to pull over, but he refused to do so. App. 97a.

After an eight-mile chase, Mr. King's vehicle was forced to a stop at a blockaded entrance to the Hanson Dam recreation area. App. 2a, 98a. Officer Melanie Singer ordered the occupants of the Hyundai out of the vehicle. App. 98a. Mr. King's companions followed these instructions and were taken into custody without incident. *Id.* Mr. King initially ignored Officer Singer's repeated orders to exit the vehicle. When he eventually emerged, he "persistently failed to comply with police

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2 "[I]t is certain that Mr. King consumed more than 80 ounces." App. 97a.

commands," App. 122a, to lie on the ground as ordered. App. 2a, 98a.

At this point Sergeant Koon arrived, joined moments later by LAPD Officers Theodore J. Briseno and Rolando Solano. App. 2a, 98a. Officer Melanie Singer unholstered her service revolver and pointed it at Mr. King, an unidentified and "still unsearched felony suspect," App. 122a, and attempted, without success, to get him to lie on the ground with his hands visible. App. 98a.

Sergeant Koon commanded Officer Singer to put away her gun, and the LAPD officers ordered Mr. King to lie in a prone position, but he continued to refuse. Officers Powell, Wind, Briseno, and Solano then jointly attempted to force Mr. King into a prone position. App. 2a, 98a. But Mr. King, who was "a large, muscular man" and, "[a]t 6'3" and approximately 225 lbs.," "appreciably larger than both Koon and Powell," App. 98a, 122a, "resisted and became combative," throwing all four officers off of him and "forcing [them] . . . to retreat." App. 98a; *see* App. 2a.

The district court concluded that it was "reasonabl[e]" for Sergeant Koon to "have suspected" at this point "that Mr. King was under the influence of PCP," because of his profuse sweating and his "erratic and recalcitrant behavior." App. 101a. Sergeant Koon fired two taser darts into Mr. King in an attempt to subdue him, to no avail, reinforcing the impression that Mr. King had ingested PCP. App. 2a, 101a. Mr. King then tried to escape, rising rapidly to his feet and charging Officer Powell, who knocked him to the ground with his baton. He continued to attempt to rise and was struck by Officers Powell and Wind. App. 101a.

The latter portion of the arrest was recorded on videotape by a bystander. App. 2a, 98a-99a. The videotape "was shown over and over and over again," *Powell* v. *Superior Court*, 283 Cal. Rptr. 777, 780 (Cal. Ct. App. 1991), "'from Paris to Tokyo,'" producing "'horror and outrage throughout this world,'" as federal prosecutors would later remind the jury, *see* App. 44a (quoting closing argument). The videotape "creat[ed] a vivid

impression of a violent encounter." App. 99a. Its showing "caused shock, revulsion, outrage and disbelief. . . . A fire storm immediately developed in the Los Angeles area, so intense and pervasive was the reaction." *Powell*, 283 Cal. Rptr. at 779. However, as the district court found, "careful analysis shows that [the videotape was] . . . sometimes an ambiguous record of the crucial events." App. 99a. The court of appeals concurred. App. 79a. Even federal prosecutors "agreed that much of the officers' conduct was justified and legal." App. 99a.[3]

2. The Investigation and First Prosecution

State prosecutors indicted Sergeant Koon and Officers Powell, Wind and Briseno on assault and related charges based on allegations that excessive force was used during the arrest. App. 4a. Federal officials worked closely with state officials throughout the state prosecution. Tracy Wood & Faye Fiore, *Beating Victim Says He Obeyed Police*, L.A. TIMES, Mar. 7, 1991, at A1. Indeed, federal investigators had begun their work just two days after Mr. King's arrest and only hours after the videotape was first broadcast on television. *Id.*

On the day the state indictment was issued, and again on March 18, 1991, Sergeant Koon met with representatives of the LAPD Internal Affairs Division ("IAD"). App. 147a. Although

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3 Approximately the first minute of the videotape records Mr. King's resistance to arrest, his attempt to escape and Officers Powell's and Wind's response. App. 3a, 101a. The district court found that the officers' actions during this period did not rise "to the level of criminal deprivation of Mr. King's rights." App. 102a. At one minute and five seconds into the videotape, Officer Briseno kicked Mr. King with a "sudden movement" that Sergeant Koon "could not have anticipated." App. 106a; *see also* App. 3a, 102a. Following this, during a period of approximately nineteen seconds, Officers Powell and Wind applied physical force that the district court found "crossed the line into criminal illegality." App. 107a; *see also* App. 3, 102a. At approximately one minute and thirty seconds, Officer Powell gave his handcuffs to Officer Briseno, and twelve seconds later, Mr. King was cuffed. App. 102a. A few seconds later, the arrest was completed. *Id.* The district court found Sergeant Koon criminally liable for the nineteen seconds of "illegal behavior" by Officers Powell and Wind. (Officer Wind was acquitted.)

Sergeant Koon initially declined to answer questions, an interviewer informed him that his failure to answer questions could result in discipline and discharge from the police force. App. 16a, 148a. The investigator advised Sergeant Koon that any statement made under compulsion of the threat of such discipline "could not be used against . . . [him] in a subsequent criminal proceeding." App. 148a. Relying on these assurances, Sergeant Koon "agreed to answer questions, and was interviewed extensively by IAD officers." *Id.* A transcript was made of the interview and supplied to Officer Briseno. App. 156a. "Briseno read the IAD statement[], or summaries thereof, before he testified at the state court proceedings." App. 156a-157a.

The state case was initially assigned for trial in Los Angeles, but the California Court of Appeal determined that the "massive local media coverage" had been "[s]o extensive and pervasive" and the "political fallout" "so intense" that "potential jurors [had] been infected to the extent there [was] a reasonable likelihood that a fair and impartial trial [could not] be had in Los Angeles County." *Powell*, 283 Cal. Rptr. at 780.[4] The case was therefore moved to Simi Valley, California for trial. App. 4a. Sergeant Koon's defense during the trial was "that the force used during the arrest of King was justified and was not excessive." *Id.*

On April 29, 1992, Sergeant Koon was acquitted on all charges. *Id.* His co-defendants were also acquitted of all charges, with the exception of an assault charge against Officer Powell, on which the jury was unable to return a verdict. *Id.*

The verdicts touched off four days of the widespread uncontrollable rioting and looting in Los Angeles and other

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[4] Publicity, emotions and the political furor surrounding the Rodney King arrest were so intense that the police chief's status was a "matter of continuing and acrimonious debate," *Powell*, 283 Cal. Rptr. at 786, the publicity eclipsed that connected with heinous crimes such as those involving Charles Manson and the "Hillside Strangler," *id.* at 785, the state appellate court received "a threat of community violence," *id.* at 787, and the "goal of a fair trial in the locality of the crime [was] practically unattainable," *id.*

cities. *See generally* Greg Braxton & Jim Newton, *Looting and Fires Ravage L.A.*, L.A. TIMES, May 1, 1992, at A1. The level and extent of civil disorder during those days were among the worst in California's and, indeed, the Nation's history. Fifty-three persons were killed, hundreds were injured, and more than $1 billion in property, including over 5,000 buildings, were destroyed. George J. Church, *Cries of Relief*, TIME, Apr. 26, 1993, at 18; Douglas Jehl & Frederick M. Meier, *Bush Arrives in L.A., Calls for Healing*, L.A. TIMES, May 7, 1992, at A1.

3. The Second Prosecution

After the riot, there were widespread calls from political and community leaders for federal prosecution of petitioner and his co-defendants to quell the anger in Los Angeles over the state court verdicts. Jack Nelson, *Bush Denounces Rioting in L.A. as "Purely Criminal,"* L.A. TIMES, May 1, 1992, at A9. Although the customary practice of the Department of Justice is not to prosecute an individual who has already been prosecuted under state law "for the same act or acts," except under "compelling" circumstances, *see Rinaldi* v. *United States*, 434 U.S. 22, 24-31 (1977), federal prosecutors obtained an indictment against Sergeant Koon and his co-defendants on August 4, 1992, on charges of violating 18 U.S.C. § 242. App. 4a, 162a-164a. Although the elements of this offense were not completely identical to those of the state charges, "[t]he operative facts and legal issues in the state and federal trials were substantially similar." App. 8a. The district court rejected petitioner's motion to hold an evidentiary hearing to determine whether the federal prosecution of Sergeant Koon after his acquittal in state court violated the Double Jeopardy Clause. App. 30a.

The federal trial commenced on February 25, 1993, in the center of Los Angeles County, only blocks away from buildings destroyed in the rioting and looting. App. 4a. Federal prosecutors utilized state investigative reports and evidence from the state trial. App. 35a; Richard A. Serrano & Henry Weinstein, *After the Riots: The Search for Answers*, L.A. TIMES, May 7, 1992, at A3.

Over objections based upon *Kastigar* v. *United States*, 406 U.S. 441 (1972), and the Confrontation Clause of the Constitution, the district court permitted prosecutors to offer into evidence the "highly damaging" (App. 4a) videotaped state trial testimony of Officer Briseno, who had read Sergeant Koon's IAD statement, and who refused to testify during the second trial. App. 20a.

The federal jury returned its verdict on April 17, 1993. App. 4a. Los Angeles police along with 600 National Guardsmen and United States Marines stood by in the event of another acquittal-inspired riot. Church, *supra*, at 18. But the federal jury returned guilty verdicts against Sergeant Koon and Officer Powell and the rioting never occurred. "'[T]he entire city just calmed down from a very nervous . . . a dangerous precipice.'" *Briseno's Attorney Looks Back At Trial*, NAT'L L.J., May 17, 1993, at 15 (quoting Officer Briseno's counsel).

4. Sentencing

On August 4, 1993, Sergeant Koon was sentenced to a term of thirty months in prison and two years supervised release. App. 4a. The district court imposed this sentence after finding that Sergeant Koon was criminally liable because he failed to prevent the unlawful application of force against Mr. King by Officers Powell and Wind during a period of approximately nineteen seconds after an unanticipated kick administered by Officer Briseno. App. 107a.

Notwithstanding that petitioner had been acquitted of assault charges in the state trial, the district court began its sentencing calculations by agreeing with the government that "the appropriate underlying offense" under the Sentencing Guidelines was "aggravated assault," which has a base offense level of 15. App. 112a. The district court increased the base by 4 levels because a "dangerous weapon," a baton, was used and by 2 levels because the victim sustained "bodily injury," App. 112a-113a, *i.e.*, "contusions, perhaps abrasions," App. 105a. Thus, the offense level applicable to the underlying "aggravated assault offense" was 21. App. 115a. The district court added that offense level to 6 to obtain a final base offense level of 27 under

U.S.S.G. § 2H1.4. App. 115a, 118a. This base offense level, combined with petitioner's Criminal History Category I, resulted in a prescribed sentencing range of 70 to 87 months. App. 118a.

Next, the district court concluded that a five-level departure downward from the prescribed range was warranted because "Mr. King's wrongful conduct contributed significantly to provoking the offense behavior." App. 119a. An additional three-level departure was deemed appropriate because of a combination of several "atypical" aspects of the case, including that (1) Sergeant Koon was "unusually susceptible to prison abuse" because of "[t]he extraordinary notoriety and national media coverage of this case, coupled with . . . [his] status as [a] police officer;" (2) he would "be subjected to multiple adversarial proceedings and stripped of . . . [his] position and tenure by the LAPD;" (3) "there is no evidence, and the government does not argue, that . . . [he is] dangerous or likely to commit crimes in the future;" and (4) "a specter of unfairness" was raised by the indictment and trial of Sergeant Koon "only after a state court jury acquitted . . . [him] of charges based on the same underlying conduct." App. 119a-120a. These departures resulted in a sentencing range of 30 to 37 months. App. 134a-135a. Petitioner was sentenced to 30 months. App. 4a.

Petitioner entered prison on October 12, 1993, after his applications for bail pending appeal were denied. *See Koon* v. *United States*, 114 S. Ct. 296 (1993) (mem.); *United States* v. *Koon*, 6 F.3d 561 (9th Cir. 1993).

B. The Decision of the Court Below

The United States Court of Appeals for the Ninth Circuit affirmed Mr. Koon's conviction. It rejected petitioner's argument that Officer Briseno's testimony should have been excluded under *Kastigar*, App. 14a-20a, expressly rejecting the "more protective" *Kastigar* standard applied by the District of Columbia Circuit in *United States* v. *North* ("*North I*"), 910 F.2d 843, *modified*, ("*North II*"), 920 F.2d 940 (D.C. Cir. 1990), *cert. denied*, 500 U.S. 941 (1991), and *United States* v. *Poindexter*, 951 F.2d 369 (D.C. Cir. 1991), *cert. denied*, 113 S. Ct. 656 (1992). The court also rejected Mr. Koon's claim that

he was entitled to an evidentiary hearing concerning his double jeopardy and due process contentions.

The court of appeals reversed the district court's decision concerning sentencing. It held that the three-level departure based upon additional punishment, absence of a need to protect the public, and successive state and federal prosecutions was impermissible under the Guidelines because, as the court below explained, consideration of any of those factors "as part of the decision to depart" is not "consistent with the structure and purposes of the Guidelines and the federal sentencing statutes." App. 59a. The court of appeals also rejected the five-level departure based upon victim misconduct. App. 70a-76a. While it accepted the district court's findings of "King's misconduct"—"speeding, driving while intoxicated, fleeing in his car from pursuing officers, refusing to obey the officers' commands to get on the ground and remain prone, attempting to escape from police custody, charging Powell," App. 70a—the court determined that no departure was warranted on these grounds because "King's provocative behavior had subsided before appellants committed the offense conduct." App. 71a.

C. The Denial Of Rehearing By The Panel And The Court En Banc And The Opinions Of The Judges Dissenting From Denial Of Review En Banc

The court of appeals denied Mr. Koon's petition for rehearing and suggestion for rehearing en banc. App. 80a-81a. Nine or more of the judges dissented from that order. App. 81a-93a.[5]

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[5] Judges Pregerson, Wiggins, Kozinski, Noonan, and Hawkins joined in all of Judge Reinhardt's dissenting opinion, including Part IV, in which he objected to the Ninth Circuit's policy of not disclosing the number of judges who vote for rehearing en banc, and implied that the number of judges voting for rehearing en banc may be greater than those who join in an opinion dissenting from denial of en banc review. App. 81a-93a. Judge O'Scannlain, joined by Judges T.G. Nelson and Kleinfeld, filed a separate opinion concurring in all of Judge Reinhardt's dissent except for Part IV. App. 93a.

The dissenters argued that "the panel seriously erred in vacating the downward departures ordered by Judge Davies." App. 81a. They concluded that "[t]he panel's unduly restrictive approach to Guidelines sentencing" was "both internally inconsistent and in direct conflict with . . . [the Ninth Circuit's] prior holdings." App. 82a.

The dissenters criticized the panel's rejection of the district court's three-level departure, explaining that none of the factors relied upon by the district court "was a *prohibited* factor" for departure under the Guidelines. App. 84a. The panel had simply "created its own category of *inappropriate* factors, namely those which are not prohibited but which in the panel's opinion do not warrant a departure." *Id.*

The dissent also disagreed with the panel's rejection of the district court's five-point departure based upon victim misconduct. App. 87a-88a. The panel had refused to permit a departure on that basis because "an act provokes only if it precipitates an immediate response." App. 88a. The dissenters criticized the panel for refusing to recognize that volatility of an arrest could ever be a permissible ground for departure in an excessive force case, "although it can point to no guideline language that would support such an absolutist view." App. 87a-88a.

The dissenting judges stressed that the panel opinion exacerbated "two contradictory general approaches to downward departures" in cases from the Ninth Circuit and elsewhere. App. 88a. In particular, the "panel's decision squarely conflicts with the considerably more flexible approach adopted by the First Circuit in a comprehensive opinion [in *United States* v. *Rivera*, 994 F.2d 942 (1st Cir. 1993),] authored by then-Chief Judge Breyer, a leading member of the initial Sentencing Commission." App. 89a-90a:

> *Rivera* . . . permit[s] departures for personal or professional consequences of conviction that are unusual. [994 F.2d] at 953-56. Moreover, it concludes that apart from a small number of factors "expressly prohibited" (as opposed to "discouraged") by the Guidelines, a

> district court may depart on the basis of any factor the presence of which is "out of the ordinary" or "unusual." *Id.* at 953. Finally, *Rivera* holds that appellate courts should defer to a district court's determination that a case is "unusual" because such a finding will "*not* involve a 'quintessential legal' interpretation of the words of a guideline, but rather will amount to a judgment about whether the given circumstances, as seen from the district court's unique vantage point, are usual or ordinary, ordinary or not ordinary, and to what extent." *Id.* at 951-52 (emphasis in original).

App. 90a.

The dissent concluded that "*Rivera* is squarely at odds with the inflexible and far stricter approach adopted . . . in this case," *id.*, and that district judges would have no "choice but to pick and choose among our various irreconcilable statements." App. 82a. They added that because the issue is important and would arise frequently, "perhaps the Supreme Court will deem it important to clarify the extent of the authority that sentencing judges possess to depart downwardly from the Guidelines." App. 90a.

REASONS FOR GRANTING THE WRIT

A. There Is A Conflict Among The Circuits Regarding The Factors That Justify Departure From The Federal Sentencing Guidelines And The Appropriate Standard Of Appellate Review Of Downward Departures Under The Guidelines.

As the nine dissenting judges explained below, the panel decision is in direct conflict with decisions in other circuits concerning the appropriate factors to be considered by a district court in determining whether to depart from the Sentencing Guidelines, as well as the standard for appellate review of such decisions. The decision below directly conflicts, for example, with *United States* v. *Rivera*, 994 F.2d 942 (1st Cir. 1993). This conflict involves extremely significant issues of institutional competence under the Sentencing Reform Act of 1984, 28

U.S.C. §§ 3551, *et seq.*, and the Sentencing Guidelines promulgated thereunder.

In *Rivera*, the First Circuit elaborated at length on the responsibilities under the Guidelines of three different institutions: the Sentencing Commission, the district courts, and the courts of appeals. 944 F.2d at 945-52. As explained by *Rivera*, the courts of appeals play a limited role. A district court is expected generally to follow the Guidelines. However, in cases that are "not ordinary," a district court may depart from the Guidelines if it explains the reasons for its departure. *Id.* at 946. The court of appeals then reviews the departure decision only for "reasonableness." *Id.* This methodology affords the Commission the flexibility necessary for it to perform its statutory role:

> [T]he commission itself would collect and study both the district courts' departure determinations and the courts of appeals' decisions, thereby learning about the Guidelines' actual workings and using that knowledge to help revise or clarify the Guidelines for the future.

Id.

Rivera explained how its general analysis applied to specific categories of departure decisions. A district court is first to determine whether a particular case is a "heartland case" or an "unusual case." *Id.* at 947. If "unusual," the district court is to determine whether the particular factors that make it "unusual" would lead to an "encouraged" departure under Part 5K of the Guidelines, a "discouraged" departure under Part 5H of the Guidelines, or a "forbidden" departure under various provisions of the Guidelines. *Id.* at 947-949. In the first instance, a departure decision would be presumptively reasonable. *Id.* at 948. In "discouraged" departure situations, the district court would not depart unless the departure factor were present in an unusual kind or degree. *Id.* The district court would not depart in "forbidden" departure situations. *Id.* at 949.

Under *Rivera*, if a sentencing factor does not fall into the "encouraged," "discouraged," or "forbidden" categories, then a district court must make a "judgment about what is appropriate,"

based upon the structure and theory of the Guidelines, as well as the relevant factors identified in 18 U.S.C. § 3553, including the "nature and circumstances of the offense," the "history and characteristics of the defendant," and various general purposes of sentencing, namely, just punishment, deterrence, incapacitation and rehabilitation.

Rivera also established standards of review for various district court determinations. Findings of fact relied upon by the district court in departure decisions are reviewed for "clear error." *Id.* at 950. If a district court departs based on a "forbidden" departure factor, or in the case of an unexplained "discouraged" departure, the district court decision is accorded no deference, and is presumably reversed. *Id.* at 951. Nor is deference to be accorded to the district court's delineation of the "heartland" of a particular guideline if that delineation involves the "quintessentially legal function" of engaging in textual analysis of the words of the guideline. *Id.*

In all other situations, the district court's decision is to be accorded deference, and is to be reviewed with "full awareness of, and respect for" the district court's "superior 'feel' for the case." *Id.* at 950 (quoting *United States* v. *Diaz-Villafane*, 874 F.2d 43, 50 (1st Cir.), *cert. denied*, 493 U.S. 862 (1989)). A district court's decision would be entitled to deference under *Rivera* if the circumstances of a particular case are of a "kind" or "degree" that render the case "unusual" (i.e., not within the "heartland"), provided the decision does not involve a "quintessentially legal" textual analysis of the words of a guideline. *Id.* at 951. *Rivera* explained that:

> A district court may well have a special competence in making this kind of determination, because it may have a better "feel" for the unique circumstances of the particular case before it. A district court is also likely to have seen more *ordinary* Guidelines cases, for appellate courts hear only a comparatively few cases that counsel believe present a colorable appeal.

Id. (emphasis in original).

Failing to defer to the areas of special competence of district courts:

> would risk depriving the Sentencing Commission of an important source of information, namely, the reactions of the trial judge to the fact-specific circumstances of the case, which reactions, reduced to written reasons for departure, can help the Commission determine whether, and how, Guidelines revision should take place.

Id.

The decision below conflicts directly with *Rivera*. The court below perceived only two standards of review as applicable to its consideration of the sentencing issues: "we review de novo whether the district court had authority to depart," and "we review the factual findings concerning serious bodily injury for clear error." App. 57a. Thus, its review of the district court's downward departures was plenary. Yet, none of the factors considered by the district court were "forbidden" or "discouraged" factors; indeed, as discussed *infra*, the district court's departure for victim misconduct is specifically "*encouraged*" by the Guidelines. U.S.S.G. § 5K2.10, p.s. (emphasis added). Nor did the district court's determinations involve the "quintessentially legal" function of textual analysis of the words of a particular guideline. Therefore, under *Rivera*, the departures would have been entitled to deference. Thus, *Rivera* and the case below are squarely inconsistent.

The decision below is also at odds with other circuits that have followed the *Rivera* standard. *See, e.g., United States* v. *Canoy*, 38 F.3d 893, 908 (7th Cir. 1994) ("when a district court clearly explains the basis for its finding of an extraordinary family circumstance, that finding is entitled to considerable respect on appeal") (citing *Rivera*); *cf. United States* v. *Kaye*, 23 F.3d 50, 52-53 (2d Cir. 1994) (noting that First Circuit "has adopted a standard of review requiring greater deference" to district court departure decisions but declining to reconsider

Second Circuit's *de novo* standard "[b]ecause even our strict *de novo* review supports the District Court's departure").[6]

The court of appeals' reversal of the district court's five-level downward departure based upon Mr. King's unlawful and provocative conduct is irreconcilable with *Rivera*. Such behavior by a victim is an "encouraged" basis for downward departure pursuant to § 5K2.10, p.s. Under *Rivera*, a departure based upon factors listed in Part 5K of the Guidelines is entitled to deference. *See Rivera*, 994 F.2d at 948. Indeed, "[a] sentencing court facing such non-heartland circumstances can feel confident, because of this encouragement, that a departure would not be 'unreasonable.'" *Id.* (quoting 18 U.S.C. § 3742(f)).

Contrary to the *Rivera* approach, the Ninth Circuit reviewed the departure decision de novo and concluded not only that victim misconduct did not justify departure in this case, but concluded *as a general rule* that this factor, regardless of "kind" or "degree," can never justify downward departure from the guideline range dictated by § 2H1.4. App. 75a-76a.[7] Thus, the court of appeals transformed what would have been a presumptively valid departure under *Rivera* and § 5K2.10 into a departure that would hardly ever be allowed.

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[6] The Eighth Circuit has conflicting precedent regarding whether the *Rivera* standard applies. *Compare United States* v. *Simpson*, 7 F.3d 813, 820 (8th Cir. 1993) (noting that *Rivera* is "an excellent analysis of the statute and guidelines governing the district court's power to impose a departure from the Guidelines sentence and the appellate court's proper function on review") *with United States* v. *Goff*, 20 F.3d 918, 920 n.1 (8th Cir.) (In *Rivera*, "the First Circuit modified . . . [the appellate review] standard to give greater deference 'to sentencing court determinations of whether (and the extent to which) given circumstances make a case "unusual" or "not ordinary." ' This circuit has not adopted that modification. . . . The author of this opinion agrees with the *Rivera* modification . . . ."), *cert. denied*, 115 S. Ct. 482 (1994).

[7] The court below indicated that departure for victim misconduct in an excessive force case would be appropriate only in extremely limited circumstances such as when "the victim kills or wounds an officer's partner in his presence," thereby causing the officer to be "seized by passion, and [to] act[] in the heat of the moment." App. 76a n.38.

The decision below concerning victim misconduct is also inconsistent with the approach of other circuits. For example, in *United States* v. *Yellow Earrings*, 891 F.2d 650 (8th Cir. 1989), the Eighth Circuit affirmed a district court's eight-level downward departure because of the victim's provocative conduct. The Eighth Circuit rejected the government's arguments to overturn the district court's decision as "border[ing] on the frivolous," *id.* at 653, and observed that "[t]he highly situation-specific nature of the Guidelines factors suggests that appellate courts should accord great deference to ensuing district court determinations—both with respect to the threshold decision to impose a sentence below the Guidelines in the first instance, as well as to the district court's determination of the extent of departure warranted." *Id.* at 654-55 (citation omitted).

The analysis below of the three-level departure is also in conflict with the standard of review applied in *Rivera*. The district court's decision to depart downward by three levels was based upon its finding that the circumstances of the particular case were of a "kind" or "degree" that rendered the case "unusual." None of the factors underlying the three-level departure is a "forbidden" or "discouraged" basis for departure, and the determination whether to depart based upon these factors did not involve a "'quintessentially legal' function." *Rivera*, 994 F.2d at 951. Therefore, under *Rivera*, such a decision would have been reviewed with full awareness of, and respect for, the district court's superior "feel" for the case. Instead, the Ninth Circuit engaged in plenary review, and created a new set of "forbidden" factors.

This Court recently stated that "[a]lthough the [Sentencing Reform] Act established a limited appellate review of sentencing decisions, it did not alter a court of appeals' traditional deference to a district court's exercise of its sentencing discretion." *Williams* v. *United States*, 112 S. Ct. 1112, 1121 (1992). Accordingly, "except to the extent specifically directed by statute, 'it is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence.'" *Id.* (quoting *Solem* v. *Helm*, 463 U.S. 277, 290 n.16 (1983)). The *Rivera* standard of

deference to district court departure decisions is consistent with this principle. The de novo standard applied by the court below is not.[8]

The problems for district courts presented by the intercircuit conflict on the standard of appellate review for downward departures are serious indeed and should be addressed by this Court.

B. The Circuits Are Divided Regarding The Admissibility Under *Kastigar* v. *United States* Of The Testimony Of A Witness Exposed To A Defendant's Compelled Statement.

The Self-Incrimination Clause of the Fifth Amendment excludes from evidence not only the accused's coerced statement, but also *all* other evidence "derived directly and indirectly" from that statement. *See Kastigar* v. *United States*, 406 U.S. 441, 453 (1972). Indeed, the Fifth Amendment "prohibits the prosecutorial authorities from using the compelled testimony in *any* respect." *Id.*[9] Accordingly, once the defendant establishes

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[8] Moreover, as the dissenters below emphasized, the decision below does little to clarify—and, indeed, further confuses—the law regarding whether "personal and professional consequences" of a conviction can be appropriate grounds for departures. The panel appeared to join both sides of that issue. The panel had first stated that such factors "are not appropriate grounds for departing, nor are they appropriately considered as part of a larger complex of factors," App. 62a—a proposition "consistent with" *United States v. Alvarez-Cardenas*, 902 F.2d 734, 737 (9th Cir. 1990), but which "conflicts squarely with *United States v. Mondello*, 927 F.2d 1463, 1469-70 (9th Cir. 1991)," App. 85a (Reinhardt, J., dissenting from denial of *en banc* review), as well as *Rivera*, App. 90a. The panel later stated "that it does 'not intend to imply that factors that do not speak to' the nature of an offense or culpability 'are *never* relevant.'" App. 85a (quoting the panel's opinion at App. 61a n.33).

[9] Although *Kastigar* involved testimony that was compelled under the federal use immunity statute, this Court has held "that the immunity provided by the statute [in *Kastigar*] is coextensive with the Fifth Amendment privilege." *Doe* v. *United States*, 487 U.S. 201, 208 n.6 (1988); *see Kastigar*, 406 U.S. at 453. Thus, the principles of *Kastigar* apply not only to immunized testimony, but also to any other type of compelled or coerced statements, including (as in the present case) statements made by public employees "under threat of removal from office" after "invok[ing] their Fifth

[Footnote continued on next page]

that his statement was "compelled" within the meaning of the Fifth Amendment, a "heavy burden" is placed on the government to "prov[e] that all of the evidence it proposes to use was derived from legitimate independent sources" and not from the compelled statement itself. *Id.* at 461-62; *see also Murphy* v. *Waterfront Comm'n of New York Harbor*, 378 U.S. 52, 79 n.79 (1964).

Although the general teaching of *Kastigar* is well-established, federal appellate courts have divided sharply over the specific requirements that the government must meet in order to rely on testimony from a witness who has been exposed to the defendant's coerced statement. The Ninth Circuit rule, as articulated by the court below, is that the prosecution must demonstrate simply that "the substance of the exposed witness's testimony is based on a legitimate source that is independent of the . . . [compelled] testimony," and need not address the extent to which the testimony may have been affected by the witness's exposure to the compelled statement. App. 18a-19a. As the court below acknowledged, however, (*see* App. 17a-19a) that approach is squarely at odds with the standard adopted by the District of Columbia Circuit in *United States* v. *North* ("*North I*"), 910 F.2d 843, *modified*, ("*North II*"), 920 F.2d 940 (D.C. Cir. 1990), *cert. denied*, 500 U.S. 941 (1991), and *United States* v. *Poindexter*, 951 F.2d 369 (D.C. Cir. 1991), *cert. denied*, 113 S. Ct. 656 (1992). In those cases, the court held that the prosecutor satisfies its *Kastigar* burden not only by proving (as in the Ninth Circuit) "that there is an independent source for all matters on which the witness testifies," App. 17a-18a (citing *Poindexter*, 951 F.2d at 373), but also (unlike in the Ninth Circuit) "that any witness exposed to compelled statements has not shaped or altered her testimony in any way, either directly or indirectly, as a result of that exposure," *id.* at 18a (citing *Poindexter*, 951 F.2d at 373; *North II*, 920 F.2d at 942; *North I*, 910 F.2d at 860-63, 872-73).

[Footnote continued from previous page]

Amendment rights." App. 15a; *see Garrity* v. *New Jersey*, 385 U.S. 493, 500 (1967).

To satisfy the District of Columbia Circuit standard, the prosecution must demonstrate either that the witness's testimony was "canned" prior to the witness's exposure to the compelled statement or offer equally compelling proof that the testimony was not affected in any way by this exposure. *See North II*, 920 F.2d at 942-43. The court below explicitly recognized that this showing is not required in the Ninth Circuit and noted the conflict between the Ninth and District of Columbia Circuits on this point: "[*North* and *Poindexter*] are not the law of this circuit. . . . We decline to adopt the D.C. Circuit's more protective standard." App. 18a, 19a n.13.

The conflict in the lower courts over the *Kastigar* requirements is not limited to the Ninth and District of Columbia Circuits. For example, the Sixth Circuit has adopted a standard similar to the Ninth Circuit rule. *See United States* v. *Bartel*, 19 F.3d 1105, 1112 (6th Cir.) ("'In order to meet the burden of proof under *Kastigar*, the government must establish by a preponderance of the evidence that the evidence used against the defendant was obtained from a legitimate, independent source.'") (citation omitted), *cert. denied*, 115 S. Ct. 113 (1994). The Eleventh Circuit and New Mexico Supreme Court, by contrast, have followed the approach of the District of Columbia Circuit. *See United States* v. *Schmidgall*, 25 F.3d 1523, 1528 (11th Cir. 1994) ("The protection against self-incrimination is violated whenever the prosecution presents a witness whose testimony is shaped—directly or indirectly—by immunized testimony, regardless of how or by whom the witness was exposed to that testimony. Prohibited indirect derivation includes using immunized testimony to help shape the questioning of another witness.") (citing *North II*, 920 F.2d at 942; *Kastigar*, 406 U.S. at 460); *State* v. *Vallejos*, 883 P.2d 1269, 1276 (N.M. 1994) ("A prohibited use of immunized testimony 'occurs if a witness's recollection is refreshed by exposure to the defendant's immunized testimony, or if his testimony is in any way "shaped, altered, or affected," by such exposure.'") (quoting *Poindexter*, 951 F.2d at 373 (quoting *North I*, 910 F.2d at 863)).

The importance of this Court's resolution of the conflict among the courts of appeals is obvious. The lower courts are

routinely called upon to hold *Kastigar* hearings to evaluate the admissibility of evidence. *See, e.g., In re Grand Jury Subpoenas Dated December 7 and 8* v. *United States*, 40 F.3d 1096, 1101 n.4 (10th Cir. 1994) ("[I]t has become common for the district court to hold a '*Kastigar* hearing'. . . ."') (citing cases), *petition for cert. filed*, 63 U.S.L.W. 3644 (U.S. Feb. 17, 1995) (No. 94-1401). Guidance from this Court is thus needed in this oft-litigated area.

Resolution of the *Kastigar* issue is of vital significance to the present case. Petitioner and Officer Powell "gave compelled statements to the LAPD Internal Affairs Division" after being "warned that they could lose their jobs if they refused to make statements." App. 14a-15a. It is undisputed that Officer Briseno—who gave testimony that, in the words of the court below, was "highly damaging to" petitioner, App. 4a—received a copy of petitioner's compelled statement before testifying. App. 20a n.14. At the *Kastigar* hearing, Officer Briseno "exercised his Fifth Amendment right and declined to testify regarding his ability during the state trial to segregate the effects of his exposure to . . . [Sergeant Koon's compelled] statements." App. 158a. Yet, the district court nevertheless admitted Officer Briseno's testimony into evidence based simply upon an annotated transcript that purportedly established "independent sources" for the testimony, but which did not address whether the testimony had been shaped or altered by Officer Briseno's exposure to the compelled statement. App. 157a.[10]

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[10] Petitioner argued below that the testimony of Mark Conta, the government's use-of-force expert, also should have been excluded under *Kastigar* because he had approximately twenty conversations with and heard the testimony of Fred Nichols, another use-of-force expert who was exposed to Sergeant Koon's compelled statement. App. 21a. Although the district court found that Mr. Conta was not exposed to petitioner's statement, this finding is subject to serious question on remand if the D.C. Circuit's standard applies because Mr. Nichols' testimony was excluded after he "testified that his testimony would be affected by . . . [his] exposure" to Sergeant Koon's statement, *id.*, and thus Mr. Conta's testimony may also have been "indirectly" "shaped, altered, or affected" by petitioner's statement as a result of his numerous contacts with Mr. Nichols.

C. The Decision Below Conflicts With Decisions Of Other Circuits And Of This Court As To The Appropriate Definitions Of Unlawful Force And Custody Under The Fourteenth Amendment.

Petitioner was charged with violating Mr. King's Fourteenth Amendment substantive due process rights while Mr. King was in official custody. App. 47a. Yet, over petitioner's objection, the district court instructed the jury with respect to the charge against Sergeant Koon using the Fourth Amendment definitions of "unlawful force" and "custody," instead of definitions based upon the Fourteenth Amendment that were proffered by defendant. The district court's instructions, which were affirmed by the court of appeals as correct statements of the law, are inconsistent with decisions of other circuits and this Court.

The district court relied on *Graham* v. *Connor*, 490 U.S. 386 (1989), involving a Fourth Amendment violation, to instruct the jury, over petitioner's objection, that the use of force is illegal if it is "objectively unreasonable," *id.* at 397. *See* App. 47a. However, the Court in *Graham* did not hold that the objective reasonableness standard was applicable to violations of substantive due process. Indeed, the *Graham* Court described a narrower definition of unlawful force under the Due Process Clause: "excessive force that amounts to punishment." *Id.* at 395 n.10 (citing *Bell* v. *Wolfish*, 441 U.S. 520, 535-39 (1979)).

In *United States* v. *Cobb*, 905 F.2d 784 (4th Cir. 1990), *cert. denied*, 498 U.S. 1049 (1991), which (like the present case) involved a 18 U.S.C. § 242 prosecution, the Fourth Circuit approved a jury instruction defining unlawful force for substantive due process violations as force applied "maliciously or sadistically for the very purpose of causing harm." *Id* at 787-88. The Fourth Circuit recognized that this instruction, based on *Johnson* v. *Glick*, 481 F.2d 1028 (2d Cir.), *cert. denied*, 414 U.S. 1033 (1973), "adequately conveyed" the law that a substantive due process violation occurs only if the use of force "'shock[s] the conscience'" or is intended as punishment. *Cobb*, 905 F.2d at 789.

The district court rejected petitioner's proffered instructions that were based upon *Cobb*, *Johnson* and *Wolfish*, and the court below affirmed. Relying on *United States* v. *Reese*, 2 F.3d 870 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 928 (1994), the court of appeals determined that the Fourth Amendment "objective reasonableness" standard should apply, even though petitioner was charged only with violating Mr. King's substantive due process rights and not his Fourth Amendment rights. App. 47a-48a. The court below thus determined that Sergeant Koon could be found to have violated Mr. King's substantive due process rights even if neither he nor the other officers applied force that rose to the level of being "shocking to the conscience." App. 49a. The court of appeals interpreted substantive due process to encompass not only the narrow right to be free from "excessive force that amounts to punishment," *Graham*, 490 U.S. at 395 n.10, but also the "broader right" simply "to be protected from *harm*." *Id.* (emphasis in original).

The court of appeals' expansion of substantive due process in this fashion is at odds not only with this Court's approach to this area of the law, but with the law in other circuits as well. Indeed, the court below interpreted substantive due process so broadly that, as it candidly acknowledged, state actors can violate substantive due process based upon "no more than" failing to protect a person in custody from "a common-law crime or tort" committed by others. Yet the court of appeals failed to explain how its expansive view of substantive due process could be justified under this Court's precedents.

The court below also adopted a more expansive definition of "official custody" than recognized in this Court's substantive due process cases. The district court instructed the jury with a definition taken from Fourth Amendment cases—"a person is in official custody if, 'in light of all circumstances surrounding the incident, a reasonable person in that situation would have believed he or she was not free to leave,'" App. 51a—and rejected petitioner's proposed instruction that would have defined official custody to have occurred only after the alleged victim is "taken to 'a police facility or other pretrial detention facility.'" *Id.* Although the court below summarily dismissed petitioner's

proposed definition of official custody as "logically fallacious," *id.*, the court failed to explain how its expansive interpretation of substantive due process was in accordance with this Court's precedents.

The court below substantially broadened the definitions of unlawful force and custody under substantive due process to be the same as the Fourth Amendment standard, apparently to salvage an indictment that did not charge petitioner with violating Mr. King's Fourth Amendment rights. The resulting inconsistency among the circuits regarding the substantive due process standards for application of force calls for corrective action by this Court.

D. In Light Of The Extraordinary Circumstances Of This Case, The Court Should Reexamine the Dual Sovereignty Doctrine And Address Whether The Successive Prosecutions Of Petitioner Violated The Double Jeopardy Clause Of The Fifth Amendment Or The Due Process Clauses Of The Fifth And Fourteenth Amendments.

Applying the "dual sovereignty doctrine," this Court has held that successive state and federal prosecutions do not implicate double jeopardy or related due process concerns. *See, e.g., Abbate* v. *United States*, 359 U.S. 187 (1959); *Bartkus* v. *Illinois*, 359 U.S. 121 (1959); *United States* v. *Lanza*, 260 U.S. 377 (1922); *cf. Heath* v. *Alabama*, 474 U.S. 82 (1985) (successive prosecutions by different states do not violate double jeopardy). The prosecution of petitioner after his acquittal in state court, however, is an egregious and impermissible extension of that doctrine and calls into question whether it should be reconsidered and more narrowly articulated, if not reversed.[11]

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[11] *See, e.g.*, Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 COLUM. L. REV. 1 (1995); Ronald J. Allen, *Freedom From Double Jeopardy, Our Lost Liberty*, WALL ST. J., Mar. 17, 1993, at A15; Paul G. Cassell, *The Rodney King Trials and the Double Jeopardy Clause: Some Observations on Original Meaning and the ACLU's Schizophrenic Views of the Dual Sovereign Doctrine*, 41 UCLA L. REV. 693 (1994); Susan N. Herman, *Double Jeopardy All Over Again: Dual Sovereignty, Rodney King, and the ACLU*, 41 UCLA L. REV. 609 (1994);

[Footnote continued on next page]

See United States v. *Grimes*, 641 F.2d 96, 101 (3d Cir. 1981) ("[A] reexamination of *Bartkus* may be in order, since questions may be raised regarding both the validity of this formalistic conception of dual sovereignty and the continuing viability of the opinion's interpretation of the Double Jeopardy Clause with respect to the states."); *Turley* v. *Wyrick*, 554 F.2d 840, 842-43 (8th Cir. 1977) (Lay, J., concurring), *cert. denied*, 434 U.S. 1033 (1978). A large body of scholarship in this area has "virtually uniformly argued against the dual sovereignty theory the Court has forged, advocating its abolition or at least limitation." Herman, *supra* note 11, at 618 n.32.[12]

[Footnote continued from previous page]

Paul Hoffman, *Double Jeopardy Wars: The Case For a Civil Rights "Exception,"* 41 UCLA L. REV. 649 (1994); Paul Craig Roberts, *Justice Takes A Double Jeopardy Hit*, WASH. TIMES, May 3, 1993, at E3; Stuart Taylor Jr., *Repeat Offenses*, AM. LAWYER, Sept. 9, 1992, at 8; Bruce J. Terris, *Corruption of Justice in L.A.*, LEGAL TIMES, Apr. 26, 1993, at 22.

[12] *See, e.g.*, Daniel A. Braun, *Praying to False Sovereigns: The Rule Permitting Successive Prosecutions in the Age of Cooperative Federalism*, 20 AM. J. CRIM. L. 1 (1992); Walter L. Fisher, *Double Jeopardy, Two Sovereignties and the Intruding Constitution*, 28 U. CHI. L. REV. 591 (1961); J.A.C. Grant, *The Lanza Rule of Successive Prosecutions*, 32 COLUM. L. REV. 1309 (1932); Harlan H. Harrison, *Federalism and Double Jeopardy: A Study in the Frustration of Human Rights*, 17 U. MIAMI L. REV. 306 (1963); Evan Tsen Lee, *The Dual Sovereignty Exception to Double Jeopardy: In the Wake of Garcia* v. *San Antonio Metropolitan Transit Authority*, 22 NEW. ENG. L. REV. 31 (1987); Kenneth M. Murchison, *The Dual Sovereignty Exception to Double Jeopardy*, 14 N.Y.U. REV. L. & SOC. CHANGE 383, 426 (1986); Lawrence Newman, *Double Jeopardy and the Problem of Successive Prosecutions*, 34 S. CAL. L. REV. 252 (1961); George C. Pontikes, *Dual Sovereignty and Double Jeopardy: A Critique of Bartkus* v. *Illinois and Abbate* v. *United States*, 14 CASE W. RES. L. REV. 700 (1963); Michael A. Dawson, Note, *Popular Sovereignty, Double Jeopardy, and the Dual Sovereignty Doctrine*, 102 YALE L.J. 281 (1992); Note, *Double Jeopardy and Federal Prosecution After State Jury Acquittal*, 80 MICH. L. REV. 1073 (1982); Note, *Double Prosecution by State and Federal Governments: Another Exercise in Federalism*, 80 HARV. L. REV. 1538 (1967); James E. King, Note, *The Problem of Double Jeopardy in Successive Federal-State Prosecutions: A Fifth Amendment Solution*, 31 STAN. L. REV. 477 (1979).

The unfairness of the dual sovereignty doctrine is heightened in this case because state and federal prosecutors may have agreed that the state prosecution should proceed first, rather than vice versa, in order to avoid the double jeopardy bar of the California Constitution, which does not recognize the dual sovereignty doctrine. *See* Cal. Const., art. I, § 15; *see also* Cal. Penal Code §§ 656, 793-794 (West 1988); *People* v. *Comingore*, 570 P.2d 723 (Cal. 1977). Thus, by refraining from prosecuting petitioner until after the state trial, the federal government insured that prosecutors would have a second opportunity to convict Sergeant Koon in the event that the first prosecution did not succeed.

Petitioner acknowledges that the Court has recently rearticulated its adherence to the dual sovereignty doctrine. *See Department of Revenue of Montana* v. *Kurth Ranch*, 114 S. Ct. 1937, 1947 n.22 (1994). Petitioner nonetheless respectfully submits that the question of the validity of that doctrine—in light of the extraordinary circumstances of this case—warrants the attention of this Court.[13] For several reasons, the Court should

[13] Petitioner argued in the district court and the court of appeals that his double jeopardy and due process rights were violated on the grounds that there was sufficient federal and state collusion during the two prosecutions to fit within the "*Bartkus* exception" to the dual sovereignty doctrine. App. 29a-32a. In *Bartkus* v. *Illinois*, 359 U.S. 121 (1959), the Court suggested an exception to the dual sovereignty principle if the second prosecution was "merely a tool" of or "a sham and a cover for" prosecutors from the first action to "avoid[] the prohibition of the Fifth Amendment against a retrial of a federal prosecution after an acquittal." 359 U.S. at 122-23. In these circumstances, a court might conclude that the two prosecutions were "in essential fact" brought by the same sovereign. *Id.* at 122.

Although petitioner did not argue directly below that the dual sovereignty doctrine should be reversed or modified, both the district court and court of appeals noted their adherence to the dual sovereignty doctrine in this case. App. 68a-69a, 130a. Thus, the dual sovereignty question was preserved for this Court's review. *See Virginia Bankshares, Inc.* v. *Sandberg*, 111 S. Ct. 2749, 2761 n.8 (1991) (if "court below passed on the issue," it is preserved even if not argued below).

Even if the court below had not addressed the dual sovereignty issue, this Court would have the authority to consider the issue. *See, e.g., Stanley* v.

[Footnote continued on next page]

consider whether the Double Jeopardy Clause, as well as the Due Process Clause, preclude the successive state and federal prosecutions of petitioner in this case.

First, the text of the Double Jeopardy Clause plainly does not compel the conclusion that a federal prosecution of a defendant's conduct is permitted after a state court has acquitted the defendant of charges based upon the same conduct. The Double Jeopardy Clause commands in unequivocal terms that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. Amend. V. This provision "on its face carries no exception for different sovereignties." Herman, *supra* note 11, at 625; *see also* Amar & Marcus, *supra* note 11, at 1 ("At first blush, the federal civil rights trial of four Los Angeles police officers, following their acquittals in state court prosecutions, might seem a patent double jeopardy violation.").

Second, the history of the English common law calls into serious question whether the Framers intended—at least in the

[Footnote continued from previous page]

Illinois, 405 U.S. 645, 658 & n.10 (1972) (although precise issue was not raised below, it could be considered in this Court because it involved the same "constitutional premise raised below" and "a method of analysis [was] readily available to the state court"); *Vance* v. *Terrazas*, 444 U.S. 252, 258 n.5 (1980) ("consideration of issues not present in the jurisdictional statement or petition for certiorari and not presented in the Court of Appeals is not beyond our power, and in appropriate circumstances we have addressed them"); *Dewey* v. *Des Moines*, 173 U.S. 193, 198 (1899) ("Parties are not confined here to the same arguments which were advanced in the courts below upon a Federal question there discussed."); *see also Blonder-Tongue Laboratories, Inv.* v. *University of Illinois Foundation*, 402 U.S. 313 320 n.6 (1971); *Carlson* v. *Green*, 446 U.S. 14, 17 n.2 (1980). This Court's review of the dual sovereignty issue is appropriate particularly because it would have been futile to argue before the courts below that it should disregard long-standing dual sovereignty precedents of this Court that the courts below were bound to follow. *Cf. Erie R.R. Co.* v. *Tompkins*, 304 U.S. 64, 66, 68-69 (1938) (even though parties had not argued below the issue of whether to reverse *Swift* v. *Tyson*, 41 U.S. (16 Pet.) 1 (1842), the Court determined that it properly could consider that issue).

context of federal reprosecution following acquittal in state court—for the doctrine of dual sovereignty to be incorporated in the Double Jeopardy Clause or the Due Process Clause of the Fifth Amendment, or whether the drafters of the Fourteenth Amendment intended for this doctrine to apply in circumstances such those presented in this case. Scholarship in this area has *unanimously* concluded that "[a]t the time of both the Founding and the Reconstruction, English common law double jeopardy principles barred an English prosecution if the defendant had already been tried by a foreign government." Amar & Marcus, *supra* note 11, at 6.[14]

Third, this Court's rejection of the dual sovereignty doctrine in other areas of constitutional law has called into serious question the application of this doctrine to the Double Jeopardy Clause. The Court long ago overruled earlier decisions holding that the Self-Incrimination Clause of the Fifth Amendment did not preclude the federal government from relying on statements coerced by a state government (*Murphy* v. *Waterfront Comm'n of New York Harbor*, 378 U.S. 52 (1964)) as well as decisions holding that the Fourth Amendment did not preclude the federal government from relying on evidence obtained through an illegal search and seizure by a state government (*see Elkins* v. *United States*, 364 U.S. 206, 223-24 (1960)). Yet, as commentators have recently observed,

> while the Court eventually recognized that the . . . dual sovereignty doctrine was no longer defensible in the realms of unreasonable searches and compelled self-incriminations, it has thus far refused to dismantle the doctrine as applied to double jeopardy. This apparent doctrinal inconsistency merits close study.

Amar & Marcus, *supra* note 11, at 11-12.

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[14] *See also* Cassell, *supra* note 11, at 710 ("At the time the Framers adopted the Bill of Rights, it appears that the English precedents allowed a defendant acquitted in one court of competent jurisdiction to raise a defense of *autrefois acquit* ('formerly acquitted') to subsequent criminal charges in another court."); J.A.C. Grant, *Successive Prosecutions by State and Nation: Common Law and British Empire Comparisons*, 4 UCLA L. Rev. 1, 8 (1956) ("The common law doctrine that an acquittal or conviction by a court of competent jurisdiction is a bar to a prosecution for the same offense in England has been definitely settled by three clearcut decisions rendered prior to the American revolution.").

Fourth, even if this Court left the holdings of its earlier Double Jeopardy cases undisturbed, those holdings would not require that the dual sovereignty doctrine be applied to the facts of petitioner's case. As one commentator has observed, "the reprosecution of . . . Sergeant Stacey Koon fell within a potential exception to the dual sovereignty [doctrine]: The Supreme Court has never held that reprosecution following an acquittal is permissible under the Double Jeopardy Clause." Herman, *supra* note 11, at 610 (footnote omitted). Although in *Bartkus*, the Court held that a *state* prosecution following acquittal in federal court was not precluded by due process, that case was decided before the Double Jeopardy Clause was applied to the States through the Due Process Clause of the Fourteenth Amendment. *Id.* at 641. And, in all other cases decided by this court under the Double Jeopardy Clause, the defendant had not been acquitted in the earlier proceeding. *See Heath*, 474 U.S. 82 (Alabama death sentence upheld for defendant who pleaded guilty in Georgia for same murder); *Lanza*, 260 U.S. 377 (federal conviction upheld for defendant who was convicted in state court based upon same underlying conduct).

Finally, application of the Double Jeopardy Clause here is proper even though the elements of the federal charges against petitioner are not completely identical to those of the state charges on which he was acquitted. The critical point is that petitioner was subject to criminal prosecution a second time after he was *acquitted* in another prosecution in which the jury necessarily decided in petitioner's favor a factual question—"whether . . . [the defendants] willfully used unreasonable force." App. 14a. That was the "ultimate issue," *id.*, in the second prosecution. In rejecting petitioner's argument to exclude Officer Briseno's videotaped state trial testimony on Confrontation Clause grounds, the court below emphasized that "[t]he operative facts and legal issues in the state and federal trials were substantially similar," App. 8a, and that "there is no

suggestion that . . . the factual nature of the case . . . changed at all from the first to the second trial," App. 9a. Thus, the admission of Officer Briseno's videotaped state testimony necessarily established that the key factual issues were the same in both trials. Indeed, it is ironic that the prosecutor may rely on the identicality of the two prosecutions may be used by the prosecutor to circumvent petitioner's rights under the Confrontation Clause, but ignore the consequences of that indenticality under the Double Jeopardy Clause.

In *Ashe* v. *Swenson*, 397 U.S. 436 (1970), this Court recognized that collateral estoppel principles implicit in the Double Jeopardy Clause may preclude reprosecution in circumstances analogous to this case. In *Ashe*, the Court held that a state could not retry a defendant for robbery of a player in a poker game after the defendant had been acquitted of robbing another of the poker players. The Court reached this conclusion notwithstanding the fact that the elements of the second prosecution were necessarily different from those of the first because the victims were not identical. The Court reasoned that the jury must have decided in defendant's favor on a factual issue essential to both prosecutions (namely, whether the defendant was one of the masked men who committed the robbery), and thus the government was not allowed to litigate that issue again. Those same constitutional collateral estoppel principles should preclude reprosecution of petitioner because factual issues underlying both the state and federal prosecution were necessarily decided in petitioner's favor during the state trial.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari and set this case for plenary consideration.

April 10, 1994

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

STACEY C. KOON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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APPENDIX

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APPENDIX A

UNITED STATES of America, Plaintiff-Appellee, Cross-Appellant,

v.

Stacey C. KOON, Defendant-Appellant, Cross-Appellee.

UNITED STATES of America, Plaintiff-Appellee, Cross-Appellant,

v.

Laurence M. POWELL, Defendant-Appellant, Cross-Appellee.

Nos. 93-50561, 93-50608, 93-50562 and 93-50609

United States Court of Appeals, Ninth Circuit.

Argued and Submitted May 2, 1994.

Decided Aug. 19, 1994.

Before: BROWNING and FLETCHER, Circuit Judges, and FITZGERALD,* District Judge.

FLETCHER, Circuit Judge:

Stacey Koon and Laurence Powell ("appellants") appeal their jury convictions for deprivation of rights under color of state law in violation of 18 U.S.C. § 242. The United States appeals Koon's and Powell's sentences under the Sentencing Guidelines. We affirm the convictions but remand for resentencing.

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*Honorable James M. Fitzgerald, Senior United States District Judge for the District of Alaska, sitting by designation.

BACKGROUND

The arrest of Rodney King occurred in the early morning of March 3, 1991 in Los Angeles. After drinking malt liquor with two friends, King left a suburb of Los Angeles and began driving. At this time he was intoxicated. Officers Melanie Singer and Tim Singer, both California Highway Patrol ("CHP") officers, observed King's vehicle speeding on the 210 Freeway. The officers began to pursue the vehicle and called on the radio for help. Several Los Angeles Police Department ("LAPD") units joined in the pursuit. Among these units was one manned by Powell and his trainee, codefendant Timothy Wind. The pursuit ended when King pulled his car over at an entrance to the Hansen Dam Recreation Area on Osborne St.

The officers ordered King and the other occupants of the vehicle to get out of the vehicle and assume a felony prone position (*i.e.*, King was ordered to lie on his stomach with his arms behind his back, legs spread, heels turned away from the officers). King got out of the car but did not lie down. At this time Sergeant Koon arrived and took command. Police officers Ted Briseno and Roland Solano arrived soon after. The officers again ordered King to lie in a felony prone position.

King eventually got down on his hands and knees, but did not get into the felony prone position. Officers Powell, Wind, Briseno, and Solano attempted to place him in that position using a "team takedown" or "swarm." King became combative and the officers retreated. Koon then fired taser darts into King.

The events that occurred next were captured on videotape by George Holliday (the "Holliday videotape"). This videotape was the focus of much of the testimony at trial and is described in detail in the district court's sentencing opinion. *See United States v. Koon*, 833 F. Supp. 769, 774-80 (C.D. Cal. 1993). The following description of the events tracks the relevant time frames on the Holliday videotape.

As the videotape begins, it shows that King got to his feet in an attempt to escape. Powell and Wind began to strike King with their batons. At trial it was disputed whether Powell's first blow hit King in the head. The district court concluded that

Powell struck King's head accidentally. *Id.* at 777. King fell to the ground and attempted to rise. At 18 seconds, Briseno put his hand on Powell's baton, which Powell had raised as he stood above King.

From 18 to 30 seconds, King attempted to get up, and was struck with batons by Powell and Wind. From the 35th second to the 51st second, Powell struck King repeatedly. At approximately 43 seconds, one or more of Powell's baton blows fractured King's right leg. At 55 seconds, Powell struck King on the chest or upper abdomen. After this blow, King rolled onto his stomach and lay prone. At this point the officers suspended the use of force and stepped back for about ten seconds. Powell began to reach for his handcuffs. The district court found this movement to be evidence that Powell perceived King no longer to be a threat. *Id.*

At 1:05, Briseno moved forward and used his left foot to stomp King in his upper back or neck. King's body writhed in response. At 1:07 on the videotape, Powell and Wind began to strike King again with their batons. At approximately 1:29, King put his hands behind his neck and subsequently was handcuffed.

After King was handcuffed, Powell radioed for an ambulance. Powell sent two messages over the Mobile Digital Terminal to other officers that said "ooops" and "I havent [sic] beaten anyone this bad in a long time." Koon sent a message to the police station that said "U[nit] just had a big time use of force. . . . Tased and beat the suspect of CHP pursuit big time."

King was taken to Pacifica Hospital, where he was treated for a fractured right leg, multiple facial fractures, and multiple bruises and contusions. At the hospital, Powell learned that King worked at Dodger stadium, and said to him, "We played a little ball tonight, didn't we Rodney?" King said, "I don't know." Powell said, "You know, we played a little ball, we played a little hardball tonight, we hit quite a few home runs." King responded, "Yeah I guess so." Powell said, "Yes, we played a little ball and you lost and we won."

Koon, Powell, Wind, and Briseno were tried in state court in Simi Valley, California on charges of assault with a deadly weapon and excessive use of force by a police officer. At the trial, Koon, Wind, and Powell's defense was that the force used during the arrest of King was justified and was not excessive. In contrast, Briseno testified that excessive force was used but that he had tried to prevent its use. The four officers were acquitted on all charges except for one count against Powell on which the jury hung.

On August 4, 1992, a federal grand jury indicted the four officers. Count 1 of the federal indictment charged Powell, Wind and Briseno with willfully depriving King of his constitutional rights in violation of 18 U.S.C. § 242 and with aiding and abetting each other in violation of 18 U.S.C. § 2. Count 2 charged Koon with willfully permitting the other officers to unlawfully strike King and willfully failing to prevent the assault of King by officers in his presence, in violation of 18 U.S.C. § 242.

The case was tried to a jury commencing February 25, 1993. The jury verdicts were handed down on April 17, 1993. Officers Briseno and Wind were acquitted. Officer Powell and Sergeant Koon were found guilty of violating § 242. Koon and Powell were sentenced on August 4, 1993 to thirty months imprisonment and two years of supervised release. *See Koon*, 833 F. Supp. at 792. Appellants timely appealed their convictions and the government timely appealed the sentences. We have jurisdiction.

DISCUSSION

A. *Admission of Briseno's State Trial Testimony*

Before trial, the government moved to admit a videotape recording of codefendant Briseno's testimony in the state court proceeding. The videotape, which was ultimately played as part of the government's rebuttal case, was the subject of many motions in the district court, and continues to be the subject of various claims on appeal.

Briseno's testimony was highly damaging to Koon and Powell. He testified, among other things, (1) that Powell's first

blow hit King in the face--which was inconsistent with Powell's position at trial; (2) that Powell delivered a second series of much more forceful blows to King "from the shoulder up"; (3) that Briseno couldn't see or understand what justified the other officers' behavior; (4) that Briseno grabbed Powell's baton and told him to "get the hell off" King; (5) that Briseno yelled to Koon "what the fuck [is] going out here," but Koon did not respond; (6) that the officers continued to strike King with the baton when he was neither aggressive nor combative; and (7) that Briseno went to the police station after the incident intending to report the use of force.

At the state trial, Briseno was cross-examined by all three of his codefendants as well as the prosecutor, who spent part of his time trying to establish Briseno's own culpability. On both direct and cross-examination, Briseno stated repeatedly that he thought the other officers had acted wrongly. These statements of opinion were redacted from the videotape played at the federal trial.

On appeal, Koon and Powell contend that admission of the videotape violated their Confrontation Clause rights. They also argue that the videotape should not have been admitted as rebuttal evidence, and that it contained improper lay opinion evidence.

1. *Confrontation Clause Challenge*

"The Confrontation Clause promotes accuracy in the criminal process by ensuring that the trier of fact has a satisfactory basis for evaluating the truth of out-of-court statements." *Barker v. Morris*, 762 F.2d 1396, 1399 (9th Cir. 1985) (citations omitted). When a hearsay declarant is unavailable to testify at trial, his out-of-court statements may be admitted without violating the Confrontation Clause so long as those statements bear sufficient indicia of reliability. *Bourjaily v. United States*, 483 U.S. 171, 182-83, 107 S.Ct. 2775, 2782-83, 97 L.Ed.2d 144 (1987). "[N]o independent inquiry into reliability is required" under the Confrontation Clause, however, when the out-of-court statements "fall within a firmly rooted hearsay exception." *Id.* at 183, 107 S.Ct. at 2782. Since Rule 804(b)(1) is a firmly rooted exception to the hearsay rule, *Mattox*

v. United States, 156 U.S. 237, 15 S.Ct. 337, 39 L.Ed. 409 (1895) (discussing history of the exception); *United States v. Kelly*, 892 F.2d 255, 262 (3d Cir. 1990), our analysis focuses on whether the district court erred under Rule 804(b)(1) in admitting Briseno's former testimony.[1]

Under Rule 804(b)(1), testimony from another proceeding is not excluded by the hearsay rule if the declarant is unavailable,[2] and if "the party against whom the testimony is now offered . . . had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination."

Appellants argue that the Briseno videotape should not have been admitted because at the state trial they lacked sufficient opportunity to cross-examine Briseno. Appellants point out that in the state proceeding they did not have the benefit of various enhancements to the Holliday videotape which were available at the federal trial.[3]

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[1] The parties debate whether, given this collapse of the constitutional analysis into the Rule 804(b)(1) analysis, the abuse of discretion standard which governs admission of Rule 804(b)(1) evidence should apply, *see United States v. Lester*, 749 F.2d 1288, 1301 (9th Cir. 1984), or whether the court should review de novo those Rule 804(b)(1) cases in which a constitutional claim is raised. We need not decide the issue, however, because we conclude that appellants cannot prevail under either standard. *See United States v. Payne*, 944 F.2d 1458, 1468 n.9 (9th Cir. 1991).

[2] Appellants do not dispute that Briseno, who chose not to testify in the federal trial, was "unavailable."

[3] Three enhancements were used at the federal trial: (1) the "filtered audiotape," which filtered out helicopter noise and purportedly made audible certain commands by Koon as well as the sounds of a taser being activated just before King went down (prepared by the defense); and (2) the "zoom videotape," which blew up the frames showing Powell's first blow to King (prepared by the defense); and (3) the "registered videotape," which stabilized the video image (prepared by the government).

In the district court, in addition to arguing that the lack of these enhancements hampered their ability to cross-examine Briseno during the state proceeding, appellants argued that their motive for cross-examination was

[Footnote continued on next page]

We reject appellants' argument. Appellants had a full and fair opportunity to cross-examine Briseno in the state trial. Indeed, they do not argue that the state court in any way interfered with their ability to carry out an effective cross-examination. They instead claim that the absence of the enhancements to the videotape at the state trial amounts to a lack of opportunity. We disagree. The failure of a defendant to discover potentially useful evidence at the time of the former proceeding does not constitute a lack of opportunity to cross-examine. *See Thomas v. Cardwell*, 625 F.2d 1375, 1386 n.34 (9th Cir. 1980), *cert. denied*, 449 U.S. 1089, 101 S.Ct. 881, 66 L.Ed.2d 816 (1981). In *Thomas*, the prosecution introduced, at defendant's second trial, the testimony of a witness from defendant's first trial who had become unavailable. *Id.* at 1384. By the time of the second trial, the defendant claimed to have discovered evidence that this witness was schizophrenic. *Id.* at 1386 n.34. The *Thomas* court rejected the argument that the purported discovery of new evidence established defendant's lack of opportunity to cross-examine the witness at the first trial. After noting that there was no suggestion that the defendant's failure to discover the information was the prosecution's fault, the court explained that

> often information will surface after a trial which, if known to a defense attorney, would have made the cross-examination of a witness more thorough or even more advantageous to the defendant. Nevertheless, the lack of information does not make the opportunity for cross-examination ineffective even though the cross-examination itself is less than optimal for the defendant.

Id.

[Footnote continued from previous page]

different in the state than in the federal trial because in the federal trial the prosecution was required to show a higher level of intent.

Appellants have not pursued this latter argument on appeal.

Much the same applies here. Appellants did not lack the opportunity to cross-examine Briseno; they lacked only some of the tools which were later developed by the government or by appellants themselves, and which appellants argue would have allowed them to cross-examine Briseno to better effect. Appellants' failure to take full advantage of their opportunity to cross-examine in the first trial--by developing those tools earlier—cannot alter the fact that they *had* the opportunity. *See United States v. McClellan*, 868 F.2d 210, 215 (7th Cir. 1989) ("the emphasis in [the Rule 804(b)(1)] inquiry is upon the motive underlying the cross-examination rather than the actual exchange that took place"); *United States v. Salim*, 855 F.2d 944, 953-54 (2d Cir. 1988) (under Rule 804(b)(1), defendant is entitled to "'an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.'") (quoting *Delaware v. Fensterer*, 474 U.S. 15, 20, 106 S.Ct. 292, 294, 88 L.Ed.2d 15 (1985) (per curiam)) (emphasis in original).[4]

In addition to a full opportunity, Rule 804(b)(1) requires that appellants' motive in carrying out their state trial cross-examination of Briseno was similar to the motive they would have had in the later proceeding. We conclude easily that it was. The operative facts and legal issues in the state and federal trials were substantially similar, *see United States v. Salerno*, ___ U.S. ___, ___, 112 S.Ct. 2503, 2509, 120 L.Ed.2d 255 (1992) (Blackmun, J., concurring) ("'similar motive' does not mean 'identical motive'"), and appellants do not challenge the district court's finding to this effect. Appellants thus had every

[4] Appellants argue that the newly discovered information in *Thomas* pertained only to the credibility of the witness, whereas the newly developed enhancements here pertain to the crime itself. Appellants do not explain why this distinction matters, however, and nothing in *Thomas* reveals its significance either. At the state trial, appellants had the opportunity to cross-examine Briseno concerning both extrinsic facts about the charged crime, and circumstances in his own situation which might lessen his credibility. It is that opportunity, rather than the scope or efficacy of its employment, which is important under Rule 804(b)(1).

reason to develop Briseno's testimony in the state trial with an eye to undermining his credibility and casting into doubt his statements about their behavior. *See United States v. Poland*, 659 F.2d 884, 895-96 (9th Cir. 1981) (holding that defendant's motive for cross-examination at suppression hearing was similar under Rule 804(b)(1) to his motive for cross-examination at trial).

Appellants maintain that their position is supported by *People of the Territory of Guam v. Hayes*, 1993 WL 469357 (D. Guam 1993), in which a three-judge panel held that the trial court erred in admitting former testimony because the defendant had not had the same *motive* to cross-examine the witness about certain facts in the first trial as he had in the second trial. However, the *Hayes* court made clear that this difference in motive occurred because "different issues arose at the second trial which [defendant] could not possibly have anticipated at the first trial." *Id.* at *2.[5]

Here, by contrast, there is no suggestion that either the factual nature of the case against appellants or appellants' motive for cross-examining Briseno changed at all from the first to the second trial. All that changed was the technology that appellants might have used to enhanced the Holliday videotape as a basis for questions in the cross-examination. Because this change constitutes a deficiency in neither the opportunity to cross-examine nor the motive for doing so, appellants' argument under Rule 804(b)(1) must fail.

[5] The victim in *Hayes*, "K.," testified at defendant's first trial, but then moved from Guam and was unavailable at the second trial. K.'s testimony from the first trial was introduced at the second trial. The prosecution also called as a witness Mrs. Muna, who testified about statements made by K. which were *not* disclosed at the first trial. The appellate court concluded that defendant's motive to cross-examine K. was different at the first than at the second trial, because at the first trial defendant did not have "the additional motivation . . . of proving that K. didn't make the statements attributed to her by Mrs. Muna." *Id.* at *2.

2. *Use of Videotape as Rebuttal Evidence*

Appellants next contend that even if there was no Confrontation Clause violation, the district court erred in admitting the Briseno videotape as rebuttal evidence. As district courts have wide latitude in deciding what constitutes proper rebuttal evidence, *Geders v. United States*, 425 U.S. 80, 86, 96 S.Ct. 1330, 1334, 47 L.Ed.2d 592 (1976), we review such determinations for an abuse of discretion. *Rent-A-Center v. Canyon Television & Appliance*, 944 F.2d 597, 601 (9th Cir. 1991).

Appellants first argue that Briseno's testimony did not rebut anything presented in their defenses. We disagree. Briseno's testimony rebutted Koon's statement that Powell's first blow struck King on the shoulder area rather than on the head, Koon's expert's testimony that the officers' use of force was justified because King continue to be combative and aggressive, and Powell's former police instructor's testimony that Powell had done nothing he had not been trained to do.

Appellants next argue that even if some portions of the videotape properly rebutted elements of their cases, the district court nonetheless erred in permitting the government to introduce as rebuttal *both* those parts of the videotape which in fact rebutted their evidence, *and* those parts which were offered solely against Briseno.[6]

No one suggests that appellants have standing to appeal any violation of Briseno's rights which such procedure might have worked. Appellants instead claim that their own rights were

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[6] Briseno neither testified nor presented any evidence on his behalf, save for introducing a single boot, one he had worn the night of the incident. At trial, he argued that his Fifth Amendment rights would be violated if his former testimony was admitted against him on rebuttal despite the fact that he had put on no evidence of his own. He was concerned primarily with those portions of the videotape in which he testified that he went to the police station to file a report on the use of force. The government's position was that Briseno never went to the police station and that his false exculpatory statement was proof of his consciousness of guilt.

violated because playing the *entire* redacted videotape as rebuttal gave the government's case against them "undeserved weight and dramatic force." Reply Br. of Powell at 23.

We reject this claim. District courts have broad discretion in deciding the order in which evidence may be presented at trial. *See* Fed.R.Evid. 611(a) (trial courts "shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence"). Indeed, the Advisory Committee Notes to Rule 611(a) reveal that the rule was intended to avoid imposing on the district courts strict rules concerning the order in which evidence should be present. Moreover, several courts have held that district courts have wide discretion to allow the government to introduce as part of its rebuttal case evidence which might have been presented in the government's case-in-chief. *E.g., United States v. Tejada*, 956 F.2d 1256, 1267 (2d Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 124, 121 L.Ed.2d 80 (1992); *United States v. Braxton*, 877 F.2d 556, 561 (7th Cir. 1989).

Here, where it was unclear whether Briseno would testify at trial, and where playing the videotape during the government's case-in-chief could have been unnecessarily duplicative, the district court did not abuse its discretion in allowing the government to postpone playing the videotape until its rebuttal case. *See Tejada*, 956 F.2d at 1267 ("Any other rule would require attorneys to present evidence in advance to rebut every possible scenario that defendants might paint"). Moreover, appellants were allowed to put on surrebuttal. *See United States v. Goodwin*, 770 F.2d 631, 638 (7th Cir. 1985) (defendant's ability to present a surrebuttal case helped defuse any prejudice which might have flowed from government's rebuttal).

Appellants have not shown how playing as rebuttal those portions of the videotape pertaining solely to Briseno unfairly prejudiced them. These portions represent only a small part of the entire tape. They reflect on Briseno's credibility as a witness and thus may have helped appellants by undermining the government's reliance on his incriminating statements about appellants. In any case, having the Briseno-related portions played along with the portions rebutting appellants' cases was

simply a consequence of the joint trial. In *United States v. Papia*, 560 F.2d 827, 848-49 (7th Cir. 1977), the Seventh Circuit held that evidence rebutting one defendant's case could also be introduced, on rebuttal, against a second defendant even if that defendant had, like Briseno, presented no evidence. All codefendants suffer what appellants claim to have suffered here: the accumulation of evidence of guilt which comes from being tried with other defendants. In an extreme case, this cumulative effect may indeed become so unfairly prejudicial that severance is warranted. But clearly this is not such a case. *Cf. United States v. Baker*, 10 F.3d 1374, 1386-89 (9th Cir. 1993) (district court did not abuse its discretion in failing to sever trial lasting over 16 months and involving 15 defendants, 250 witnesses, and 30,000 pages of transcripts).[7]

3. *Lay Opinion Testimony*

Many statements in which Briseno expressed his opinion about his codefendants' wrongdoing were excised from the videotape before it was shown to the jury. Appellants contend, however, that various statements of opinion remained.

Many of the statements about which appellants complain are simply not opinions. Appellants argue that even Briseno's descriptions of the other officers' actions should not have been admitted. Appellants seem to suggest that these descriptions were akin to opinions insofar as they revealed that Briseno was testifying against his codefendants rather than on their behalf.

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[7] Appellants also contend that the admission of the video as rebuttal was inappropriate under *United States v. Neary*, 733 F.2d 210 (2d Cir. 1984), because they each had a Rule 29 motion pending. *Neary*, however, held that where the district court has erred in failing to grant defendant's Rule 29 motion at the close of the government's case-in-chief, the government cannot cure the deficiencies in its proof by pointing to evidence it presented on rebuttal, because doing so would "make a mockery" of the defendant's right under Rule 29 to acquittal where the government has not satisfied its burden of proof in its case-in-chief. *Id.* at 219-20. *Neary* would thus apply only if the government proof fell short at the close of its case-in-chief. That is not the case here. *See* Section 1, *infra*.

Whomever they have hurt or benefitted, however, the straightforward physical descriptions in question do not constitute opinions.

Appellants also contend that Briseno's statement that he went to the Foothills police station intending to report a use of force should not have been admitted, because he would not have taken this action unless he believed that the use of force had been wrong. We decline to adopt a rule barring testimony about actions which are motivated by opinions. Actions are usually motivated by opinions or beliefs, but testimony about the actions is clearly not for that reason inadmissible. Koon's testimony, for example, was filled with descriptions of actions he took because he had formed certain opinions about King's behavior.

Appellants argue that they were prejudiced when the jury learned of Briseno's statement that Powell was "out of control." This phrase was removed from the redacted version of Briseno's testimony presented to the jury. When Koon was recalled as a surrebuttal witness, however, the prosecutor on cross-examination twice referred to the fact that Briseno had said that Powell was out of control. Appellants contend that this interjection of Briseno's opinion was improper.[8]

The Federal Rules of Evidence allow lay opinion testimony so long as the opinion is "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the

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[8] Appellants' argument is based on the contention that Briseno's statements constituted lay opinion testimony. While we reject this argument, *see infra*, we note that by questioning Koon about a redacted portion of the Briseno videotape, the government improperly referred to a matter not in evidence. We conclude, however, that the error (to which no objection was made) did not affect substantial rights. The transcript of the videotape which was admitted into evidence contained opinion statements much more directly damaging to appellants than the "out of control" statements - such as Briseno's statement that the force used by Powell and Wind was unjustified. And as discussed below, *see infra* Section 1, there was ample evidence quite apart from the Briseno videotape on which the convictions could be sustained. The "out of control" statements were a tiny portion of a case which the government tried in extraordinary detail. *See Koon*, 833 F. Supp. at 774.

witness' testimony or the determination of a fact in issue." Fed.R.Evid. 701; *United States v. Juvenile Male*, 864 F.2d 641, 647 (9th Cir. 1988) (admitting, under Rule 701, witness's opinion as to defendant's intent); *accord United States v. Simas*, 937 F.2d 459, 464 (9th Cir. 1991). Both requirements were met here. First, Briseno's opinions were rationally based on his first-hand observations. Second, the opinion that Powell was out of control was helpful in determining factual issues central to the case. Appellants are wrong that Briseno's statements are no more than conclusory assertions about ultimate issues. The ultimate issue in the case was not whether the defendants were out of control, but whether they willfully used unreasonable force. The fact that Powell may have been out of control could have helped the jury resolve that issue; at the same time, it certainly did not settle the issue in and of itself.[9] Briseno's statement thus was not "testimony which merely tells [the jury] what result to reach." 3 *Weinstein's Evidence* ¶ 701[02], at 702-25.[10]

In sum, we conclude that no error was committed in the admission of the Briseno videotape.

B. *Fifth Amendment Protection Against Use of Compelled Statements*

After they were warned that they could lose their jobs if they refused to make statements, Koon and Powell gave

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[9] Moreover, the court admitted characterizations of Powell's actions, which were *helpful* to the defense—most notably, Briseno's statement that the first baton to King's head was accidental. The statement that an officer swinging a baton is out of control, like the statement that an officer has hit a suspect with a baton by accident, is both an opinion and an observation.

[10] Appellants also argue that Briseno's opinions impermissibly entered the case when the prosecutor, in closing, stated that Briseno had "testi[fied] that other people committed crimes," and that "[t]he videotape of [Briseno's] testimony shows that the beating of Rodney King was unreasonable." RT 4/10/93 (AM) at 103. But these statements are better read as permissible inferences drawn from the factual testimony which the jury heard than as surreptitious references to the opinion testimony which was excised.

compelled statements to the LAPD Internal Affairs Division. Appellants contend that the introduction of codefendant Briseno's state trial testimony and the testimony of prosecution witness Mark Conta violated their Fifth Amendment rights because Briseno and Conta were exposed to appellants' compelled statements prior to testifying.

The Fifth Amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. The Constitution thus requires that "the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth." *Miranda v. Arizona*, 384 U.S. 436, 460, 86 S.Ct. 1602, 1620, 16 L.Ed.2d 694 (1966).

In accordance with this fundamental principle, the Supreme Court has recognized that the Fifth Amendment protection against coerced statements extends to public employees who must choose either to incriminate themselves or to forfeit their jobs during an administrative hearing. *Garrity v. New Jersey*, 385 U.S. 493, 500, 87 S.Ct. 616, 620, 17 L.Ed.2d 562 (1967). Thus, where police officers such as Koon and Powell invoke their Fifth Amendment rights and subsequently make a statement under threat of removal from office, the statement is compelled and the government is precluded from using either the statement or information derived from it as evidence in the federal trial. *Id.* at 497, 87 S.Ct. at 618; *see also Kastigar v. United States*, 406 U.S. 441, 460-61, 92 S.Ct. 1653, 1664-65, 32 L.Ed.2d 212 (1972).

Once a defendant has demonstrated that his statements were compelled, the government has the burden of proving in a "*Kastigar* hearing" by a preponderance of the evidence that the evidence it intends to introduce in a subsequent criminal proceeding is not tainted by exposure to the compelled statements. *Kastigar*, 406 U.S. at 461-62, 92 S.Ct. at 1665-66; *United States v. Rogers*, 722 F.2d 557, 560 (9th Cir. 1983), *cert. denied*, 469 U.S. 835, 105 S.Ct. 129, 83 L.Ed.2d 70 (1984).

In this case, the parties disagree as to the precise type of showing that is required to establish that a witness who has been exposed to compelled testimony is not tainted by that exposure. Our circuit has twice considered this issue in the context of testimony that was compelled pursuant to federal immunity statutes. *See* 18 U.S.C. § 6002. In both cases, we held that the government meets its *Kastigar* burden by showing that each matter as to which the witness will testify is derived from a source independent of the immunized testimony.[11]

In *United States v. Lipkis*, 770 F.2d 1447 (9th Cir. 1985), the defendant first made voluntary statements on three occasions to an FBI agent and subsequently made identical statements to the same agent under a grant of immunity. *Id.* at 1449. The FBI agent became the government's witness at trial and Lipkis argued that the agent's testimony should have been excluded because it was tainted by the agent's exposure to the compelled statements. We held that because the defendant's immunized statements were the same in every material respect as the prior, non-immunized statements, the government had met its burden of proving that all the evidence introduced at trial was derived from a legitimate source that was wholly independent of the immunized statements. *Id.* at 1449-51.

Similarly, in *Rogers*, a government witness had attended a proceeding in which the defendant testified under a grant of immunity. On appeal, we held that the witness's testimony was permitted because it was clear that it was based on information

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[11] The government expresses some concern about applying cases that analyze federal use immunity statutes in the *Garrity* context. However, in *Kastigar*, the leading Supreme Court case regarding use immunity granted pursuant to 18 U.S.C. § 6002, the Court upheld the constitutionality of the federal immunity statute because it concluded that the statute provided immunity that was coextensive with the Fifth Amendment protections. 406 U.S. at 463, 92 S. Ct. at 1666. Because the use of compelled testimony in the *Garrity* context also directly implicates the individual's Fifth Amendment right against self incrimination, *Kastigar's* discussion of the scope of the Fifth Amendment privilege against self-incrimination is directly relevant in the *Garrity* context.

the witness learned on his own rather than on the immunized testimony. *Rogers*, 722 F.2d at 560.

The standard applied in our circuit is taken directly from the language of *Kastigar*, which provides:

> Once a defendant demonstrates that he has testified, under a . . . grant of immunity, to matters related [to the current prosecution], the federal authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence.
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> This burden of proof . . . is not limited to a negation of taint; rather, it imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony.

406 U.S. at 460, 92 S.Ct. 1665 (internal citations omitted) (quoting in part *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 79 n.18, 84 S.Ct. 1594, 1609 n.18, 12 L.Ed.2d 678 (1964)). Thus, under *Kastigar* and this circuit's precedent, the prosecution meets its Fifth Amendment burden of proving that compelled testimony is not used against a defendant when it produces a legitimate, wholly independent source for all matters as to which the witness will testify.

Appellants contend that we should reject the holding of *Rogers* and *Lipkis* and instead adopt the standard recently articulated by the District of Columbia Circuit in *United States v. North ("North I")*, 910 F.2d 843, *modified*, ("*North II*"), 920 F.2d 940 (D.C. Cir. 1990), *cert. denied*, 500 U.S. 941, 111 S.Ct. 2235, 114 L.Ed.2d 477 (1991), and *United States v. Poindexter*, 951 F.2d 369 (D.C. Cir. 1991), *cert. denied*, ___ U.S. ___, 113 S.Ct. 656, 121 L.Ed.2d 583 (1992). These cases, in what is "the most expansive reading of the Fifth Amendment to date regarding the evidentiary use of immunized testimony," *United States v. Helmsley*, 941 F.2d 71, 92 (2d Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1162, 117 L.Ed.2d 409 (1992), require the prosecution to make a two part showing to meet its *Kastigar* burden. First, as in our circuit, the

prosecutor must prove that there is an independent source for all matters on which the witness testifies. *Poindexter*, 951 F.2d at 373. And second, the prosecutor must prove that any witness exposed to compelled statements has not shaped or altered her testimony in any way, either directly or indirectly, as a result of that exposure. *Id.*, *North II*, 920 F.2d at 942; *North I*, 910 F.2d at 860-63, 872-73.[12]

In asking us to apply *North* and *Poindexter*, appellants fail to acknowledge that those cases are not the law of this circuit. In fact, we have previously rejected contentions similar to appellants' that *Kastigar* requires a greater showing on behalf of the prosecution. In *Lipkis*, the prosecution witness had been exposed to both immunized testimony and to non-immunized testimony. In affirming the district court, we specifically rejected the defendant's contention that *Kastigar* required the prosecution to prove that the witness's testimony was based on only the non-immunized statements and not on the identical immunized statements, recognizing that such a showing was both impossible and unnecessary. *Id.* at 1451.

In sum, it is the law of our circuit that the prosecutor's *Kastigar* burden is met if the substance of the exposed witness's testimony is based on a legitimate source that is independent of the immunized testimony. Ensuring that the content of a witness's testimony is based on personal knowledge provides the required Fifth Amendment protections and meets the *Kastigar*

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[12] In *North I*, the D.C. Circuit stated that this burden could be met by establishing that the witness's allegedly tainted testimony contains no evidence not "canned" by the prosecution before such exposure occurred. *North I*, 910 F.2d at 872-73. On rehearing, the court modified the requirement that the exposed witness's testimony be "canned," stating that this was only an example of the ways in which the prosecution's burden might be met. *North II*, 920 F.2d at 942-43 (but noting that "it may well be extremely difficult for the prosecutor to sustain its burden of proof" in the absence of canned testimony).

requirement that the defendant's compelled statements shall not be used against him in subsequent criminal proceedings.[13]

1. *Briseno's Testimony*

Prior to admitting the videotape of Briseno's state trial testimony, the district court held a *Kastigar* hearing in which it

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[13] The standard articulated by the D.C. Circuit to statements that are compelled in the *Garrity* context has potentially far-reaching ramifications. As the *North* court recognized, federal immunity statutes provide a framework for a prosecuting attorney or Congress to make a reasoned decision as to whether the benefits of obtaining compelled testimony justify the obstacles that may be created in any future prosecutions. The process of formal grants of immunity also provides time for the prosecutor to protect the testimony of potential witnesses by obtaining canned statements and by shielding these witnesses from exposure to the immunized testimony. *North II*, 920 F.2d at 945-46.

In contrast, immunity attaches in the *Garrity* context when a threat of the loss of employment forces a public employee to respond to questioning by another public employee. In this context, the individuals who question the employee are concerned about potential misconduct, and their goal is generally to learn the facts of a situation as quickly as possible. They do not necessarily act with the care and precision of a prosecutor weighing the benefits of compelling testimony against the risks to future prosecutions; indeed, they may not even have the prospect of prosecution and the requirements of the Fifth Amendment in mind. In addition, because statements may be compelled soon after the event in question, it is far more likely that these statements will be circulated before there is an opportunity to can testimony. Although this may occur out of a legitimate desire to ascertain the truth of the matter, it may also occur out of a desire to protect one's colleagues. Thus, in the context of internal affairs investigations, police officers could protect each other by compelling testimony and disseminating it widely, placing any criminal prosecution at serious risk and possibly barring prosecution altogether.

We do not mean to suggest that the showing required under the Fifth Amendment varies depending on the situation in which the testimony was compelled. The Fifth Amendment protects defendants from the use of their compelled statements regardless of when or where the statements were taken. We merely point out the implications of applying *North* in the *Garrity* context. In light of those implications and because we believe that the standards enunciated by our circuit comply fully with the requirements of the Fifth Amendment, we decline to adopt the D.C. Circuit's more protective standard.

assumed that Briseno had read Koon's and Powell's compelled statements[14] and considered whether Briseno's state trial testimony was tainted by the exposure. The court concluded that Briseno's testimony was not tainted by the exposure to the compelled statements. We review this factual finding for clear error, *see Rogers*, 722 F.2d at 560, and conclude that it is not clearly erroneous.

The record reflects a legitimate, independent source of information with respect to each matter as to which Briseno testified. Briseno was an eyewitness to the events at issue in the trial and thus had independent personal knowledge of the events to which he testified. In addition, other witnesses at the state trial, including CHP officers Melanie Singer and Timothy Singer and police officer Solano, testified before Briseno and in his presence at length about the events surrounding the arrest of Rodney King. Briseno also saw the Holliday videotape prior to giving his own testimony. Finally, both Koon and Powell testified at the state trial before Briseno testified; Briseno was present in the courtroom on those occasions and heard appellants' testimony. At the *Kastigar* hearing, the government presented an annotated transcript of Briseno's state testimony, indicating the independent sources for all of the same information contained in the compelled statements.

This case is therefore like *Lipkis*, in which a witness was exposed to two substantially identical statements, one of which was immunized and one of which was not. Like the prosecution in *Lipkis*, the prosecution in this case successfully established that Briseno's state trial testimony had a basis in legitimate, independent sources and therefore was not tainted by any exposure to Koon's and Powell's compelled statements.

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[14] The parties stipulated that Briseno received appellant's compelled statements. Pursuant to *Skelly v. State Personnel Bd.*, 15 Cal.3d 194, 124 Cal.Rptr. 14, 539 P.2d 774 (1975), LAPD officers who face disciplinary proceedings are provided with a "*Skelly* package" containing all of the evidence from internal investigations of the matter, including the compelled statements of other LAPD officers.

2. Conta's Testimony

Appellants also object to the testimony of Mark Conta, the government's use-of-force expert. At the time of the federal trial, Conta was the officer in charge of physical training and self-defense at the Los Angeles Police Academy. At trial he testified regarding use-of-force policy and gave his opinion that most of the baton blows inflicted by Powell and Wind during King's arrest were contrary to LAPD policy. Prior to trial, the district court held a *Kastigar* hearing and found that Conta had not been exposed to the compelled statements. We conclude that this finding is not clearly erroneous.

Appellants claim that Conta was indirectly exposed to their compelled statements in two ways. First, they contend that Conta listened to the testimony of Fred Nichols, the use-of-force expert the state intended to use at the state trial, at a *Kastigar* like hearing during the state trial. At that time, Nichols was Conta's supervisor and the officer in charge of physical training and self-defense at the Los Angeles Policy Academy. Although the state had planned to use Nichols as its use-of-force expert at the state trial, Nichols was disqualified as a witness after he testified at the state *Kastigar* hearing that he was exposed to the compelled statements and that his testimony would be affected by this exposure. Appellants contend that because Conta was present at this hearing at which Nichols testified regarding his exposure to the compelled statements, Conta also was exposed to the compelled statements.

Conta's presence at the state hearing, however, did not expose him to the compelled statements. The transcript of the hearing reflects that Nichols testified only regarding when he was exposed to the compelled statements and whom he spoke to about those statements. Nichols did not quote or read from the compelled statements, nor did he engage in any discussion regarding the substance of the statements.

Appellants also contend that Conta was exposed to the compelled statements during approximately twenty informal discussions with Nichols about the King incident. At the *Kastigar* hearing, Conta agreed that he conversed with Nichols about the King incident but stated that at no time did Nichols

make any statement that related to or appeared to relate to the content of the compelled statements. Conta further testified:

> You see, when the Rodney King incident occurred two years ago today, and we witnessed the TV portions of the tape and then on March the 8th I watched the tape in its entirety as I indicated, and I knew at that time that Sergeant Nichols was probably going to come forward and represent [sic] the state during the prosecution process, and I also knew that sergeant--excuse me--Detective Arce and Kwock who were at the office at this time had requested that Sergeant Nichols prepare a document.
>
> Sergeant Nichols told me that this document was confidential and that he was going to render an opinion that was going to go to the state grand jury. That was a cue to me, and it was very clear in my mind, that Sergeant Nichols was on a mission, and it was his responsibility, and that he was going to go forward and testify for the prosecution, and he was going to go forward and prepare this document. And he told me that he was going to prepare this document and that it was confidential. Confidential. I wanted to stay away from him. I felt that it was his thing and that I wanted to stay away and I didn't want to get into any deep discussions regarding the Rodney King incident based on that fact and that information.

RT 3/3/93 at 39. In addition, Conta noted that his testimony at trial would be based on his twenty-two years of experience as a police officer, his education as a training officer for nine and a half years, his training at the Los Angeles Police Academy in the use-of-force policy and self defense techniques, his review of the Holliday videotape, the arrest report prepared by Powell, the sergeant's log prepared by Koon, a use-of-force report, a CHP supplemental report, and the state trial testimony of Koon, Powell, and Briseno.

Faced with this evidence, the district court found that Conta was not exposed to appellants' compelled statements. We conclude that this finding is not clearly erroneous.

C. *Severance*

Appellants challenge the district court's refusal to sever their trial from codefendant Briseno's. We review a district court's denial of a motion to sever a trial for an abuse of discretion. *United States v. Vasquez-Valasco*, 15 F.3d 833, 844 (9th Cir. 1994); *United States v. Cuozzo*, 962 F.2d 945, 949 (9th Cir.), *cert. denied*, ___ U.S.___, 113 S. Ct. 475, 121 L.Ed.2d 381 (1992).

Fed.R.Crim.P. 14 governs the severance of defendants or charges.[15] Rule 14 recognizes that even when defendants are properly joined under Fed.R.Crim.P. 8(b), severance may be appropriate to avoid prejudice to a defendant. The party seeking reversal of the denial of a motion to sever bears the burden of proving such "clear, manifest, or undue prejudice from the joint trial, that [it] violates one of his substantive rights, so that the prejudice is of such a magnitude that the defendant was denied a fair trial." *E.g.*, *Vasquez-Valasco*, 15 F.3d at 845-46 (internal quotations omitted).

In this case, appellants argue that the district court should have severed the trial on the grounds that they and Briseno presented mutually antagonistic defenses.[16] *See, e.g., United*

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[15] Rule 14 provides in relevant part:

> If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

[16] We reject the government's contention that Powell waived his right to appeal this issue because he failed to renew his motion to sever at the close of the government's case. Although a defendant generally waives a severance motion by failing to renew it at the close of evidence, "[t]his requirement is not an inflixible one; waiver may be absent when the motion accompanies the introduction of evidence deemed prejudicial and a renewal at the close of all evidence would constitute an unnecessary formality." *United States v. Felix-Gutierrez*, 940 F.2d 1200, 1208 (9th Cir. 1991), *cert. denied*, ___ U.S. ___, 113 S.Ct. 2332, 124 L.Ed.2d 244 (1993) (internal quotations omitted).

[Footnote continued on next page]

States v. Tootick, 952 F.2d 1078, 1083-86 (9th Cir. 1991); *United States v. Rucker*, 915 F.2d 1511, 1513 (11th Cir. 1990). Appellants' argument is without merit.

The fundamental flaw in appellants' claim is that Briseno did not raise an inconsistent defense in the federal trial; in fact, the only independent defense he raised was to offer into evidence the boot he wore on the night in question. Thus, no antagonistic defenses were raised in the federal trial.

In fact, Appellants' argument rests on the fact that their defense strategy in the *state* trial differed from that of Briseno: while appellants' defense was that no excessive force was used, Briseno's defense was that his fellow officers used excessive force which he tried to prevent. Admission of the videotape of Briseno's state trial testimony did not constitute grounds for severance, however, because the majority of statements on the videotape were admitted into evidence to rebut assertions made by Koon and Powell, *see* Fed.R.Evid. 804(b)(1); *Zafiro v. United States*, ___ U.S. ___, ___ 113 S.Ct. 933, 938, 122 L.Ed.2d 317 (1993), and therefore would have been admitted even if Briseno had not been a codefendant in the federal trial. Moreover, the evidence from the videotape which was admitted solely against Briseno was not unduly prejudicial to appellants. That evidence consisted primarily of Briseno's testimony in the state trial that, after the use of force, he was upset about the use

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[Footnote continued from previous page]

"The guiding principle is whether the defendant diligently pursued the motion." *Vasquez-Velasco*, 15 F.3d at 845 & n.9 (internal quotations omitted). In this case, Powell diligently pursued the motion; he moved to sever the trial prior to trial and renewed his motion immediately prior to the admission of the evidence deemed prejudicial--the recorded trial testimony of Briseno. *Id.* at 845. Moreover, the district court had previously denied the defendants' motions for severance on two occasions, indicating that a renewal of the motion after the government's rebuttal would have been an unnecessary formality. *See Cuozzo*, 962 F.2d at 949, n.5; *United States v. Kaplan*, 554 F.2d 958, 966 (9th Cir.), *cert. denied*, 434 U.S. 956, 98 S.Ct. 483, 54 L.Ed.2d 315 (1977).

of force and returned to the policy station to report the incident. Briseno testified that while he was at the station he noticed a message from Koon over the Mobile Digital Terminal which he interpreted as a report of the incident, and he decided that he did not need to file a report because Koon had already reported the incident. This testimony was neither mutually antagonistic to appellants' defense nor was it unduly prejudicial.

Even if we were to assume that the videotape was admitted only because Briseno was a codefendant, Briseno's state trial defense and appellants' federal defense were not irreconcilable. Although we have recognized that "mutually antagonistic" or "irreconcilable" defenses may be so prejudicial as to require severance, severance based on these grounds is appropriate only when "the acceptance of one party's defense will preclude the acquittal of the other party.... [T]he essence or core of the defenses must be in conflict such that the jury, in order to believe the core of one defense, must necessarily disbelieve the core of the other." *United States v. Sherlock*, 962 F.2d 1349, 1362-63 (9th Cir.) (internal citations and quotations omitted), *cert. denied*, ___ U.S. ___, 113 S.Ct. 419, 121 L.Ed.2d 342 (1992). In this case, the Briseno tape and appellants' defense were not mutually exclusive because a jury could find that Briseno thought the force was excessive while also finding that the force was not in fact excessive. *See, e.g., United States v. Arias-Villanueva*, 998 F.2d 1491, 1506-07 (9th Cir.), *cert. denied*, ___ U.S. ___, 114 S.Ct. 359, 126 L.Ed.2d 322 (1993). Alternatively, a jury could believe Briseno's testimony that the use of force was excessive but also acquit all of the officers on the grounds that it was not willful.

Appellants also suggest that their defenses were mutually antagonistic because they have taken adversarial positions to Briseno in Rodney King's subsequent civil suit. Appellants do not explain how such a factor is in any way relevant to the district court's denial of their motion to sever in the criminal case. We therefore conclude that because no mutually irreconcilable defenses were presented by Briseno and

appellants, the district court did not abuse its discretion in refusing to sever the trial.[17]

D. *District Court's Failure to Disqualify Powell's Counsel*

Koon contends that the district court erred by failing to disqualify Powell's attorney before trial. Most of the relevant facts are not disputed. Shortly after the Rodney King incident, the Los Angeles Police Protective League appointed Michael Stone, its General Counsel, to represent Powell. Darryl Mounger was appointed to represent Koon. Stone also represented Powell in the federal civil case related to this case. Mounger, however, declined to represent Koon in the civil case. In an effort to assist Koon, Stone contacted Thomas Feeley, a civil rights defense lawyer. Feeley agreed to represent Koon in the civil case.

While the state criminal action and the federal civil action were pending, Stone and Feeley joined their practices. They obtained written waivers of conflict from their clients before forming the new firm. After the firm was formed, oral waivers were taken on the record in the state criminal proceeding.

Eleven months after the waiver in state court, and three months before the federal criminal trial was to begin, Koon revoked his waiver and requested that the district court grant whatever relief it deemed appropriate under *Wheat v. United States*, 486 U.S. 153, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988). Koon explained that intervening events had led him to believe that a conflict existed. The most important of these events stemmed from the formation of the partnership between Feeley and Stone: Koon feared that Stone might gain access to

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[17] Even in cases in which defendants do raise mutually antagonistic defenses, there is no per se rule requiring severance. *See Zafiro*, ___ U.S. at ___, 113 S.Ct. at 938 (stating that "Rule 14 does not require severance even if prejudice is shown; rather, it leaves the tailoring of the relief to be granted, if any, to the district court's sound discretion").

confidential information possessed by Feeley, and might use it to Koon's disadvantage in the criminal trial.

The district court's solution was to disqualify Feeley from representing Koon in the civil trial, but to allow Stone to continue to represent Powell in the criminal trial. We review that decision for abuse of discretion. *See United States v. Baker*, 10 F.3d 1374, 1399 (9th Cir. 1993).

1. *The Stone & Feeley Partnership*

As the district court explained, the conflict asserted here more closely resembles "successive representation" than "dual representation." The problem Koon complains of is not that his attorney in the criminal case was unable to be completely loyal to him, but rather that confidences which he had divulged to an attorney in another case might be used against him in the criminal case.

The leading case on successive representation in this circuit is *Trone v. Smith*, 621 F.2d 994 (9th Cir. 1980), in which we restated the rule that an attorney must be disqualified if he or she formerly represented an adverse party in a matter "substantially related" to the current representation. *Id.* at 998 (citing *Gas-A-Tron of Arizona v. Union Oil Co. of California*, 534 F.2d 1322, 1325 (9th Cir.), *cert. denied*, 429 U.S. 861, 97 S.Ct. 164, 50 L.Ed.2d (1976)). Substantial relationship may be presumed where there is a "reasonable probability that confidences were disclosed which could be used against the client in later, adverse representation." *Id.* at 998. But even if there is no sharing of confidences, "[t]he substantial relationship between the two representations is itself sufficient to disqualify." *Id.* at 999.

Attorney conflict may require a court to disqualify counsel despite the fact that the rights of a party may be compromised by that disqualification. While a trial judge "must recognize a presumption in favor of [defendant's] counsel of choice ... that presumption may be overcome not only by a demonstration of actual conflict but by a showing of a serious potential for conflict." *Wheat*, 486 U.S. at 164, 108 S.Ct. at 1700.

The task for the district court was to balance Powell's qualified Sixth Amendment right to the counsel of his choice

against the potential for conflict asserted by Koon. *See United States v. Wheat*, 813 F.2d 1399, 1402 (9th Cir. 1987), *aff'd*, 486 U.S. 153, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988); *United States v. Cunningham*, 672 F.2d 1064, 1070 (2d Cir. 1982).

The district court recognized that Powell's interest in retaining Stone was strong. Stone had represented Powell at the state criminal trial, had obtained good results for him there, and was familiar with the case.

The district court found that Koon's interests, by contrast, were weak. The court noted that at the time Feeley and Stone joined their practices, their firm adopted screening procedures designed to ensure that confidential information Koon had imparted to Feeley would not be disclosed to Stone. There was also evidence that Stone had never discussed confidential information about Koon with Feeley, did not have access to Feeley's files, and had never met with Koon outside the presence of one of Koon's criminal attorneys.

This circuit has not yet decided whether such screening procedures, or such evidence, may rebut the presumption that lawyers in the same law firm share information. *See Trone*, 621 F.2d at 999 n.4; *Paul E. Iacono Structural Eng'r, Inc. v. Humphrey*, 722 F.2d 435, 442 (9th Cir. 1983). We need not resolve that issue here. On appeal, we have the advantage of hindsight. Allowing Stone to continue as Powell's attorney worked no disadvantage to Koon: Koon points to nothing in the course of trial which even suggests that Stone behaved adversely to him on the basis of confidential information, or, indeed, that Stone behaved adversely to him at all.

This court has cautioned that where a criminal defendant's right to the counsel of his choice is at loggerheads with the need for conflict-free counsel, "[r]eviewing courts should be especially wary of complaints of error," because trial courts are placed "in a position to be whipsawed in the expectation of a guaranteed error no matter which way the courts rule." *Wheat*, 813 F.2d at 1402. Here, where Koon can point to *no ill consequence* flowing from the district court's elevation of Powell's right to the counsel of his choice over Koon's right to avert a possible breach of confidentiality, we cannot say that the

district court abused its discretion when it found that Koon had shown neither an actual conflict nor a serious potential for conflict. As subsequent events have made clear, the district court accurately assessed the possibilities.[18]

2. Other Allegations of Conflict

Koon also argues that a conflict was evidenced by the following facts: (1) Stone returned to the government a memorandum the government had inadvertently disclosed, and did so without showing the memorandum to Koon; (2) Powell's position on certain evidentiary issues was contrary to Koon's; (3) Powell's sister worked as a secretary in Stone's law office; and (4) Stone had announced during the state court proceedings that an expert might not be able to testify because of an attorney-client relationship with Stone.

The district court found that none of these facts established a conflict: (1) Stone acted properly by returning the government memorandum; (2) Powell's and Koon's positions on evidentiary issues were not necessarily inconsistent; (3) no showing had been made that Powell's sister had access to any material pertaining to Koon; and (4) Koon's fear that potential expert witnesses in *this* case would decline to testify based on previous

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[18] We recognize that the district court also had an obligation to ensure that the proceedings *appeared* to be fair. *See Wheat*, 486 U.S. at 160, 108 S.Ct. at 1698. For this reason, it might be argued that rules relating to conflict must be applied prophylactically, and that we must review this case without benefit of hindsight. If we were to constrain ourselves to such an application, the result would be no different. Even at the time the district court ruled on the matter, Koon had shown little more than the appearance of a conflict. We have expressed "grave doubts" as to whether mere appearances would ever be enough to deprive a criminal defendant of the right to counsel of his choice, *United States v. Washington*, 797 F.2d 1461, 1466 (9th Cir. 1986), and we note that the test formulated in *Wheat* itself directs courts to look for a "*serious potential* for conflict," rather than the mere appearance of conflict. 486 U.S. at 164, 108 S.Ct. at 1700. Here, where Powell had a strong Sixth Amendment right in retaining Stone as his attorney, we conclude that the district court did not abuse its discretion in protecting that right rather than removing what can only be characterized as the possible appearance of a highly attenuated conflict.

contacts with Stone was speculative, and his fear that Stone might place future business advantage ahead of the welfare of defendants was unsupported by evidence.

On appeal, Koon presents nothing to refute these findings. We therefore conclude that the district court did not abuse its discretion by declining to disqualify Powell's attorney.

E. *Double Jeopardy Claim*

Appellants challenge the district court's refusal to grant them a hearing on their claim of double jeopardy. Prior to trial, appellants requested an evidentiary hearing to determine if there was sufficient collusion between federal authorities and the state authorities to preclude the federal prosecution under *Bartkus v. Illinois*, 359 U.S. 121, 79 S.Ct. 676, 3 L.Ed.2d 684 (1959). We review the court's denial of this motion for an abuse of discretion. *United States v. Russotti*, 717 F.2d 27, 31 (2d Cir. 1983), *cert. denied*, 465 U.S. 1022, 104 S.Ct. 1273, 79 L.Ed.2d 678 (1984).

The Double Jeopardy Clause of the Fifth Amendment provides "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." Nevertheless, under the doctrine of dual sovereignty, successive prosecutions based on the same underlying conduct do not violate the Fifth Amendment's Double Jeopardy Clause if the prosecutions are brought by separate sovereigns. *Heath v. Alabama*, 474 U.S. 82, 93, 106 S.Ct. 433, 440, 88 L.Ed.2d 387 (1985); *United States v. Guy*, 903 F.2d 1240, 1242 (9th Cir. 1990).

Our circuit has recognized a narrow exception to this general rule: "[i]f the second prosecution, otherwise permissible under the dual sovereignty rule, is not pursued to vindicate the separate interests of the second sovereign, but is merely pursued as a sham on behalf of the sovereign first to prosecute, it may be subject to a successful double jeopardy challenge." *Guy*, 903 F.2d at 1242; *see also United States v. Figueroa-Soto*, 938 F.2d 1015, 1018-19 (9th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1181, 117 L.Ed.2d 424 (1992). This exception is referred to as the "*Bartkus* exception" in reference to the Supreme Court

case from which it was derived. *See Bartkus v. Illinois*, 359 U.S. 121, 79 S.Ct. 676, 3 L.Ed.2d 684 (1959).

To establish double jeopardy, it is not sufficient for the defendant to show that there was cooperation between federal and state authorities; rather, the defendant must prove that the subsequent prosecuting entity is a "tool" for the first, or the proceeding is a "sham," done at the behest of the prior authority. *Figueroa-Soto*, 938 F.2d at 1019; Guy, 903 F.2d at 1242-43; *United States v. Bernhardt*, 831 F.2d 181, 182 (9th Cir. 1987).[19] In this case, appellants ask us to remand this case for an evidentiary hearing to determine whether the federal government's prosecution was the product of state and federal collusion extensive enough to amount to a second prosecution by the state. Although we have never articulated what a defendant must show to obtain an evidentiary hearing, we have stated that he must make more than "conclusory allegations" of collusion. *Russotti*, 717 F.2d at 31.

Appellants point to several factors which, they contend, warrant a hearing in this case: (1) the federal investigation began when the crime occurred and remained active during the state investigation and prosecution; (2) federal and state authorities cooperated with each other, and the state delivered evidence and investigative reports to federal authorities after the

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[19] The *Bartkus* exception is narrow, and seldom successfully pursued. *E.g., United States v. Paiz*, 905 F.2d 1014, 1024 (7th Cir. 1990) (compiling list of cases), *cert. denied*, 499 U.S. 924, 111 S.Ct. 1319, 113 L.Ed.2d 252 (1991). Our decision in *Figueroa-Soto* demonstrates the narrowness of the exception. 938 F.2d 1015. In *Figueroa-Soto*, we concluded that the *Bartkus* exception did not apply, even though the state prosecuted at the request of federal authorities; federal agents assisted the state prosecution, sat at the state prosecutor's table, and testified as witnesses; evidence collected by federal authorities was given to state authorities for use in the state trial; the sentence of one prosecution witness was postponed until he had testified at the state trial; a federal forfeiture proceeding was delayed so as not to prejudice the state prosecution; FBI agents prepared state trial witnesses; and the state prosecutor was appointed as special assistant to the U.S. Attorney and paid by the state for the subsequent federal prosecution. *Id.* at 1018-19.

state prosecution; (3) witnesses who testified in the federal trial were interviewed by the federal authorities soon after the incident; and (4) the Briseno videotape was admitted into evidence in the federal trial.

Despite these factors, appellants point to nothing that suggests the federal prosecution was merely a sham. These factors at most show cooperation between federal and state authorities. The fact that the federal government has conducted its own investigation weakens appellants' argument, as it indicates that the federal government was not a "tool" of the state authorities. *See Guy*, 903 F.2d at 1243. Moreover, the fact that evidence developed from the state trial was used in the federal trial does not create a double jeopardy problem. *Cf. Figueroa-Soto*, 938 F.2d at 1018-19 (evidence collected by federal authorities given to state authorities for state prosecution).

In sum, there is no evidence that the federal prosecution was a "sham" or a "cover" for the state prosecution. *Cf. Bernhardt*, 831 F.2d at 181-83 (remanding for further factual finding where defendant showed that state prosecutor, who could not prosecute defendant due to statute of limitations, enlisted U.S. Attorney in prosecution with the understanding that the state prosecutor would be the lead attorney in the federal case and would be paid by the state); *see also Paiz*, 905 F.2d at 1025 no.14 (no hearing required where defense showed that federal agent was involved in state investigation and arrest and that state prosecutor was designated a U.S. attorney for the federal prosecution). The district court did not abuse its discretion in denying appellants' motions for an evidentiary hearing.

F. *Denial of Appellants' Peremptory Challenges*

Appellants claim that the district court denied them the right to exercise peremptory challenges against two black jurors.

In *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), the Supreme Court held that the discriminatory exercise of peremptory challenges violates the equal protection clause. *Batson*'s holding has been extended to peremptory challenges exercised by criminal defendants.

Georgia v. McCollum, ___ U.S. ___, 112 S.Ct. 2348, 120 L.Ed.2d 33 (1992); *United States v. DeGross*, 960 F.2d 1433, 1339-42 (9th Cir. 1992) (en banc). Under *Batson*, the prosecution first must make out a prima facie case of racial discrimination; to rebut, the defense must then articulate a race-neutral explanation for the challenge. *McCollum*, ___ U.S. at ___, 112 S.Ct. at 2359.[20] We review the district court's factual findings for clear error. *DeGross*, 960 F.2d at 1442.

1. *Juror No. 263*

Juror No. 263, a black man, provided the following answers on a questionnaire he filled out before voir dire:

> 98. (a) How would you describe the media coverage of the underlying incident between the police officers and Rodney King?
>
> _X_ Fair and accurate
>
> ___ Distorted and exaggerated
>
> (b) How would you describe the media coverage of the previous trial?
>
> _X_ Fair and accurate
>
> ___ Distorted and exaggerated
>
> * * * * *
>
> 109. What was your personal initial reaction to the verdicts in the state court trial?
>
> **My personal reaction was unfair.**[21]

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[20] On appeal, Koon and Powell raise not a *Batson* claim but the reverse of one: They claim that their right to exercise peremptory challenges was violated because the district court went too far in protecting *Batson* rights asserted by the government. Since the question is what the proper limits of *Batson* are, the same analytic framework applies. *See United States v. Bentley-Smith*, 2 F.3d 1368, 1373-77 (5th Cir. 1993).

[21] Throughout the voir dire, it was assumed that Juror No. 263 meant that he felt the verdicts were unfair.

110. Did you feel that justice had been served or were you disappointed with the verdicts?

Disappointed.

When Juror No. 263 was questioned on voir dire his answers changed. He stated that he no longer thought the verdict was unfair, and explained that his ideas had changed "after listening to things" said by others during the voir dire. RT 2/22/93 at 62. He said that his opinion now was that justice had been served by the Simi Valley verdicts; he was no longer disappointed in those verdicts. He also stated that although he thought at the time the Holliday videotape was first aired that what the defendants had done was wrong, he had now changed his perception, because through the voir dire he had come to realize that he "didn't have the whole facts to base an opinion on." *Id.* at 75.

Juror No. 263 had also written on his questionnaire that what he remembered about the Rodney King case "was how had the news people handled a very important trial." *Id.* at 61. On voir dire, he explained that in this answer he had been referring to the news media's exploitation of the event.

A defense challenge for cause was denied. The defendants then sought to exercise a peremptory challenge. The government objected on *Batson* grounds, and the district court asked the defense to articulate race-neutral reasons for the challenge.

Appellants contend that the district court erred by not first requiring the government to make out a prima facie case. At this stage, however, any error of this kind is irrelevant: "[o]nce the party making the peremptory challenge has offered a race-neutral explanation for the peremptory challenge and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the [party opposing the peremptory challenge] had made a prima facie showing becomes moot." *Hernandez v. New York*, 500 U.S. 352, 359, 111 S.Ct. 1859, 1866, 114 L.Ed.2d 395 (1991) (plurality opinion); *United States v. Changco*, 1 F.3d 837, 839-40 (9th Cir.), *cert. denied*, ___ U.S. ___, 114 S.Ct. 619, 126 L.Ed.2d 583 (1993) (same); *United States v. Bishop*, 959 F.2d 820, 824 (9th Cir. 1992) (same).[22]

The defense furnished two reasons for challenging Juror No. 263: the juror's answers about press coverage were inconsistent both within the questionnaire and with his answers in court; and Juror No. 263 had stated on his questionnaire that he was disappointed in the Simi Valley verdicts, and found them unfair. To refute these reasons, the government argued (1) that Juror No. 263's answers regarding the press were not inconsistent, and (2) that Juror No. 263's answers on the questionnaire regarding the Simi Valley verdicts were superseded by the more favorable answers he gave on voir dire, and that the defense had accepted non-minority jurors who had changed their answers in apparent response to the educative process of the voir dire. The government also argued that the defense had engaged in a pattern of exercising peremptory challenges against minority jurors, and that defense counsel had questioned minority jurors vigorously, in an attempt to unearth something which would serve as a basis for disqualification, while using voir dire with white jurors as an opportunity to educate and indoctrinate.

The district court, after hearing argument from all counsel, stated as follows:

> [T]he Court believes and so rules that the government has made a prima facie showing and that considering the totality of the circumstances that do pertain, the explanation for the challenge is insufficient, it does not meet the test and, therefore, the challenge will not be allowed.

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[22] *Hernandez* and the cases following it dispense with appellants' argument that "the trial court unfairly imposed a higher burden on the defense to shift the burden to the government when it exercised peremptory challenges to white jurors than it imposed on the government to shift the burden to the defense to justify its challenges to black jurors." Br. of Powell at 31. Since the "height" of the initial burden is moot at this stage, differing heights for different parties are of no significance.

RT 2/22/93 at 105. In reviewing this finding, we must consider "all relevant circumstances," including any pattern of peremptory challenges against minority jurors and the questions and statements made during voir dire. *Batson*, 476 U.S. at 96-97, 106 S.Ct. at 1723.

We do not find in the record clear-cut evidence either way. The defendants' claim that Juror No. 263's answers about the press were inconsistent appears weak: media coverage can be exploitative and accurate at the same time. The defendants' stated concerns about Juror No. 263's reaction to the Simi Valley verdicts appear to stand on firmer ground, but in at least one instance, the defense accepted without challenge a non-minority juror who professed to have been shocked by the Simi Valley verdicts, and who stated that she had anticipated on the basis of the Holliday video that at least one of the defendants in the state prosecution would be convicted. The record reveals that the defense attorneys engaged in far more vigorous questioning of Juror No. 263 than of the non-minority jurors who were questioned on the same day, although there are also suggestions in the record that those jurors may have appeared desirable to the defense for reasons other than race (e.g., positive contacts with or friends in law enforcement). Minority jurors questioned on previous days were subjected to vigorous voir dire by defense counsel; several non-minority jurors, however, were closely questioned as well. After the questioning on previous days, the defendants collectively or individually exercised against minority jurors two of the three peremptory challenges they ultimately used. A third minority juror, No. 598, initially was not challenged by the defense.

The evidence points in both directions. In such a situation, we must defer to the district court's factual findings: "'where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.'" *Hernandez*, 500 U.S. at 369, 111 S.Ct. at 1871 (plurality) (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 574, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985)). We note that in this case the evidence was bound up at every stage with the need to make determinations of credibility. As the Supreme Court has explained,

> [i]n the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed. There will seldom be much evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge. As with the state of mind of a juror, evaluation of [that attorney's] state of mind based on demeanor and credibility lies "peculiarly within a trial judge's province."

Hernandez, 500 U.S. at 365, 111 S.Ct. at 1869 (quoting *Wainwright v. Witt*, 469 U.S. 412, 428, 105 S.Ct. 844, 854, 83 L.Ed.2d 841 (1985)). Here, the district court's observation of demeanor was particularly important, since the court had to assess not only the credibility of the attorneys, but also the credibility of those jurors who purported to have been reformed through the educative process of the voir dire. The two credibility assessments were interrelated: the more convincing the juror, the less believable the attorney who attempted to exercise the challenge.

Determinations as to lawyer credibility were clearly the crux of the matter in this case. As the Fifth Circuit recently noted in the context of a *McCollum* challenge, "the ultimate inquiry for the judge is not whether counsel's reason is suspect, or weak, or irrational, but whether counsel is telling the truth in his or her assertion that the challenge is not race-based." *United States v. Bentley-Smith*, 2 F.3d 1368, 1375 (5th Cir. 1993). Recognizing that on this most crucial issue, "[w]e have only a cold transcript to guide us while the trial judge was there to observe the jury selection--day in and day out," *Burks v. Borg*, Nos. 83-15263/16546, 1994 WL 280285 at *4 (9th Cir. June 27, 1994), we will not substitute our judgment for that of the district court.

2. *Juror No. 598*

The jury was sworn on February 22, 1993. On February 23, 1993, Koon's attorney informed the court that Juror No. 421, a reserve police officer who had been excused for cause, had contacted him: Juror No 421 had related to

Koon's attorney that Juror No. 598, a black woman seated on the jury, had made various disdainful comments to him regarding defense strategy and the racial composition of the jury. Koon moved to reopen the voir dire. The court summoned Juror No. 421.

In court, Juror No. 421 testified that when he had told Juror No. 598 that he felt she was "good jury material," she responded that the Simi Valley jury had been all white; that "they" (the defense attorneys) had managed to get all the blacks kicked off; and that they would most likely do the same in the federal trial.

Koon renewed his motion to reopen voir dire on the basis that the statements attributed to Juror No. 598 were inconsistent with her answers on the questionnaire and on voir dire. Koon also moved for a mistrial, and all defendants joined. The court took the motions under submission. The following day, the court denied the mistrial motions and informed counsel that it would consider a brief questioning of Juror No. 598.

On February 25, 1993, the court and all counsel met with Juror No. 598 in chambers, and the court questioned Juror No. 598 about Juror No. 421's allegations. Juror No. 598 denied them all. The court asked counsel if they had anything else. Only the government attorney replied, and he said that he had nothing. The in-chambers conference was adjourned. In open court, Wind again moved for a mistrial, and Briseno joined the motion. Koon and Powell did not. The motion was denied. The trial then commenced, with Juror No. 598 seated on the jury.

Appellants now argue that the district court erred because "it denied the defense the ability to exercise a peremptory challenge." Br. of Appellant Powell at 31. The record does not support this argument. Rather, the record reveals that Koon and

Powell simply dropped the issue after the *in camera* questioning of Juror No. 598.[23]

We therefore review the case for plain error affecting substantial rights. *United States v. Olano*, ___ U.S. ___, ___, 113 S.Ct. 1770, 1779, 123 L.Ed.2d 508 (1993); *United States v. Sterner*, 23 F.3d 250, 251 (9th Cir. 1994). Assuming without deciding that substantial rights were at issue here, we see no plain error. When a court is informed that a juror may have failed to disclose a relevant fact during voir dire, the proper course of action, once the jury has been sworn, is for the court to question the juror and excuse her if necessary, not to reopen the whole jury selection process. *See United States v. Berryhill*, 880 F.2d 275, 279 (10th Cir. 1989) (affirming conviction over defendant's contention that he was denied his right to exercise peremptory challenges, where information about jurors which should have been disclosed on voir dire was disclosed after first day of trial, and where district court questioned jurors, discharged one of the two, and seated an alternate), *cert. denied*, 493 U.S. 1049, 110 S.Ct. 853, 107 L.Ed.2d 846 (1990). The district court followed the procedure which has been endorsed by this court in cases of juror bias or misconduct, carefully questioning both the juror whose impartiality had been attacked and other relevant witnesses, and inviting counsel to do the same. *See United States v. Armstrong*, 909 F.2d 1238, 1244 (9th Cir.), *cert. denied*, 498 U.S. 870, 111 S.Ct. 191, 112 L.Ed.2d 153 (1990); *United States v. Sears*, 663 F.2d 896, 899-900 (9th Cir. 1981), *cert. denied*, 455 U.S. 1027, 102 S.Ct. 1731, 72 L.Ed.2d 148 (1982). The district court found that Juror No. 598 was not biased, and nothing in the record establishes that that finding was clearly erroneous. We find no error here, let alone the plain error which warrants reversal where a claim has been abandoned below.

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[23] Koon and Powell did not join in Wind's post *in camera* mistrial motion, although on other occasions when the same issue was raised, Koon and Powell jointed. RT 2/23/94 at 113.

G. *Prosecutorial Misconduct*

Appellants argue that several statements made by the prosecution during its rebuttal closing argument were improper and prejudicial. Because appellants did not make a contemporaneous objection to any comments they now challenge, we review their claims for plain error. *United States v. Young*, 470 U.S. 1, 16, 105 S.Ct. 1038, 1046-47, 84 L.Ed.2d 1 (1985). "A plain error is a highly prejudicial error affecting substantial rights." *United States v. Dischner*, 974 F.2d 1502, 1515 (9th Cir. 1992) (internal quotations omitted), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1290, 122 L.Ed.2d 682 (1993).

Prosecutors may not make comments calculated to arouse the passions or the prejudices of the jury. *Viereck v. United States*, 318 U.S. 236, 247-48, 63 S.Ct. 561, 566, 87 L.Ed. 734 (1943); *Commonwealth of Northern Mariana Islands v. Mendiola*, 976 F.2d 475, 486-87 (9th Cir. 1992). As the D.C. Circuit has stated:

> A prosecutor may not urge jurors to convict a criminal defendant in order to protect community values, preserve civil order, or deter future lawbreaking. The evil lurking in such prosecutorial appeals is that the defendant will be convicted for reasons wholly irrelevant to his own guilt or innocence. Jurors may be persuaded by such appeals to believe that, by convicting a defendant, they will assist in the solution of some pressing social problem. The amelioration of society's woes is far too heavy a burden for the individual criminal defendant to bear.

United States v. Monaghan, 741 F.2d 1434, 1441 (D.C. Cir. 1984) (internal citations omitted), *cert. denied*, 470 U.S. 1085, 105 S.Ct. 1847, 85 L.Ed.2d 146 (1985); *see also Northern Mariana Islands*, 976 F.2d at 486-87; *United States v. Solivan*, 937 F.2d 1146, 1150-55 (6th Cir. 1991).

While recognizing that prosecutors may not appeal to the passions of the jury, in analyzing the effect of a comment upon the jury we accord due respect to the common sense of jurors. The Supreme Court has stated that

> [i]solated passages of a prosecutor's argument, billed in advance to the jury as a matter of opinion not of evidence, do not reach the same proportions [as "[t]he 'consistent and repeated misrepresentation' of a dramatic exhibit in evidence"]. . . . [A] court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through a lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations.

Donnelly v. DeChristoforo, 416 U.S. 637, 646-47, 94 S.Ct. 1868, 1873, 40 L.Ed.2d 431 (1974) (quoting *Miller v. Pate*, 386 U.S. 1, 6, 87 S.Ct. 785, 787, 17 L.Ed.2d 690 (1967)).

Appellants challenge several remarks made by the prosecution in its rebuttal closing argument. We examine each comment in turn.

Appellants first challenge statements telling the jury that they are "the conscience of the community."[24] An appeal to the jury to be the conscience of the community is not impermissible unless it is "specifically designed to inflame the jury." *United*

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[24] Counsel stated:

> Judge Davies will give you your break, and then he'll instruct you in the law, and you will walk into the jury room to deliberate, and you will leave this courtroom, and convinced and confident with the truth, and you will leave with your collective good common sense, because ladies and gentlemen of the jury, *you're the conscience of the community. You decide what conduct is acceptable by your police. And what conduct violates the law.* Defendant Koon and the other defendants beat a man who was not combative, who was not an aggressor until he begged for mercy, knowing it was wrong. . . . *There are some countries where people can be beaten by the police until they beg the police to stop, but not in this country. Not now, not 200 years ago when this Constitution was written, and with your decision, not ever.*

RT 4/10/93 at 107-08 (emphasis added).

States v. Williams, 989 F.2d 1061, 1072 (9th Cir. 1993) (internal quotations omitted); *United States v. Lester*, 749 F.2d 1288, 1301 (9th Cir. 1984). In this case, when the prosecutor's statement is considered in context, it is clear that it was not designed to inflame the jury, but rather to explain to jurors that they were in the position to determine whether the charged conduct comported with community standards of reasonableness. The reference was not accompanied by any suggestion of the consequences of a particular verdict, nor did the prosecutor suggest to the jury that it had a direct stake in the outcome of the case. *See United States v. Kopituk*, 690 F.2d 1289, 1342-43 (11th Cir. 1982), *cert. denied*, 463 U.S. 1209, 103 S.Ct. 35-42, 77 L.Ed.2d 1391 (1983). The comment did not cross the line "demarcating permissible oratorical flourish from impermissible comment calculated to incite the jury against the accused." *Lester*, 749 F.2d at 1301 (quotations omitted).

Appellants also challenge the prosecutor's statement that the jury would have to decide what conduct is "acceptable by your police" and what conduct "violates the law." They contend that this statement suggested that the jury was obligated to decide more than just this case. We disagree. In order to decide whether appellants used unreasonable force, the jury was required to decide whether appellants' actions were acceptable or whether those actions violated the law. These comments did not place upon the jurors the burden of maintaining social order. They were not improper.

Appellants next challenge the prosecutor's reference to the Constitution, and contend that the prosecutor told the jury that the survival of the Constitution rested on their verdict. Again, we believe this ascribes an unreasonable meaning to the prosecutor's statements. A jury would interpret the prosecution's references the Constitution to assert that it is their job to interpret and apply the Constitution, and not as a statement that the Constitution will collapse if there were an acquittal. *Donnelly*, 416 U.S. at 647, 94 S.Ct. at 1873. The reference was within the bounds of advocacy permitted to the prosecutor.

Appellants also argue that the prosecutor invited jurors to convict appellants in order to influence the manner in which police officers are trained to use force. During closing argument, government counsel posed the rhetorical question:

> But the real question here is a little different. Knowing what you know about Sergeant Conta and about Sergeant Duke, which of those two officers would you want teaching recruits how much force can be used against the citizens of this community? That's the real question, and you know the answer.

RT 4/10/93 at 75.

We do not understand this comment to invite jurors to convict defendants in order to influence the manner in which police are trained. *Donnelly*, 416 U.S. at 647, 94 S.Ct. at 1873. The remark was made in response to defense closing arguments, in which counsel compared the testimony of Conta, the government use-of-force expert, and Duke, the defense use-of-force expert. Defense counsel had asked the jurors to consider which officer—Conta or Duke—they would prefer to call in the middle of the night when they needed help, and suggested that the jurors would prefer Duke. In the government's rebuttal, counsel compared the testimonies of Duke and Conta, and then made the challenged comment. In this context, a jury would understand the prosecutor's comments as a challenge to Duke's opinion regarding what is reasonable and unreasonable in the use of force. The comment was not improper.

The final comment to which appellants object is troubling. During the trial, the government had emphasized that appellants failed to write in their police reports that King was on the ground when most of the force was used, and argued that this omission occurred because appellants knew that the use of force was unreasonable. In response, defense counsel suggested that people often make mistakes about what they see and suggested that when the jury first saw the video, they noticed different things. On rebuttal, government counsel responded:

> Now, how does Mr. Stone explain the lies and omissions? Well, he tells you that everyone sees things differently. . . .
>
> When the video was played people may have noticed different details about what was occurring in he video, but there was one thing that everyone from Paris to Tokyo noticed, one thing that everyone saw. There was one thing that caused horror and outrage throughout this world. There was one thing that neither you nor anyone else missed when they saw that video tape. And the thing that everybody saw, that everybody was so outraged about was that the defendants were beating a man who was on the ground. That's why there was such outrage. That's why there was such uproar.

RT 4/10/93 at 81-82.

These remarks regarding the "horror and outrage" evoked from "Paris to Tokyo" by the Holliday video went beyond the bounds of appropriate advocacy and were improper. In this case, the worldwide broadcast of the Holliday videotape and the acquittal of appellants by the Simi Valley jury sparked widespread rioting and general public outrage of which the jurors could not help but be aware. In this context, the prosecutor's references to public outrage could easily incite the passions, fears, and prejudices of the jurors, remind them of the social ramifications of their verdict, and persuade them to convict the defendants for reasons irrelevant to appellants' guilt.

Even when a remark is improper, however, we can reverse only when the statement substantially prejudices a defendant's trial. *E.g., Territory of Guam v. Quichocho*, 973 F.2d 723, 727 (9th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1014, 122 L.Ed.2d 162 (1993); *Lester*, 749 F.2d at 1301. While we certainly do not condone the government's behavior, we also cannot find that it constitutes plain error. We rely on several factors to reach this conclusion.

First, appellants have drawn a few sentences from a trial that lasted over a month and from detailed closing arguments

that lasted many hours. The remarks were not part of a series of improper comments by the prosecutor, but were in fact made in response to defense arguments: in using the phrase "Paris to Tokyo," government counsel merely was repeating a term previously used by defense counsel to attack King's credibility. *See Monaghan*, 741 F.2d at 1443 & n.42. The misconduct by the prosecution was partially invited, isolated, and of limited severity. *See Williams*, 989 F.2d at 1072; *Monaghan*, 741 F.2d at 1443.

Second, government counsel, defense counsel, and the district court all admonished the jurors to base their verdict only on the evidence before them, and to ignore what they knew about the first trial or what the possible ramifications of any verdict might be. The court also instructed the jurors to rely only on the evidence introduced at trial, and reminded them that oral argument is not evidence. Such instructions dilute the potential prejudice arising from improper statements. *E.g., Williams*, 989 F.2d at 1072; *Lester*, 747 F.2d at 1301; *United States v. Flake*, 746 F.2d 535, 542 (9th Cir. 1984), *cert. denied*, 469 U.S. 1225, 105 S.Ct. 1220, 84 L.Ed.2d 360 (1985).

Third, unlike cases in which there is little evidence on which the jurors could base a conviction, in this case there was substantial independent evidence to support a finding of guilt. *See United States v. Modica*, 663 F.2d 1173, 1182 (2d Cir. 1981), *cert. denied*, 456 U.S. 989, 102 S.Ct. 2269, 73 L.Ed.2d 1284 (1982). Finally, the verdicts acquitting two police officers and finding two guilty is indicative of the jury's ability to weigh the evidence without prejudice. *Monaghan*, 741 F.2d at 1443 n.45.

In light of these factors, we conclude that the jury's ability to weigh the evidence impartially was not materially affected by the prosecutor's improper remarks. *Cf. Williams*, 989 F.2d at 1072; *United States v. Polizzi*, 801 F.2d 1543, 1558 (9th Cir. 1986).

H. *Jury Instructions*

After closing arguments, the district court instructed the jury that the government had the burden of proving beyond a

reasonable doubt, *inter alia*, (1) that the conduct of the defendants deprived King of a right secured by the Constitution or other federal law; and (2) that the defendants acted willfully.

In the indictment, Powell, Briseno, and Wind were charged with depriving King of the right to be free from unreasonable force in the course of an arrest. Koon was charged separately under Count 2 with depriving King of "the right preserved and protected by the Constitution of the United States not to be deprived of liberty without due process of law, including the right to be kept free from harm while in official custody." Consequently, with respect to deprivation of rights, the jury was given separate instructions as to Koon.

Koon contends that the instructions relating to deprivation of rights in his case were erroneous. Both Koon and Powell contend that the district court's instructions on willfulness were erroneous.

1. *Deprivation of Rights by Koon*

The district court instructed the jury as follows:

> Count 2 charges that Defendant Koon did willfully commit other officers to unlawfully assault Rodney King, who was then in the custody of those officers.
>
> The Fourteenth Amendment right to be kept free from the deprivation of liberty without due process of law includes the right to be kept free from an unreasonable use of force while in official custody. A police officer, having a right to arrest a person who has committed a crime, has an equal duty to protect that person from unreasonable assault or injury from any source while that person is in official custody. In other words, a police officer has a duty to insure that persons in official custody are not unreasonably assaulted by others, including police officers.
>
> A person is in official custody if, in light of all circumstances surrounding the incident, a reasonable person in that situation would have believed he or she was not free to leave.

RT 4/10/93 (Jury Instructions) at 15-16. The court then defined unreasonable force, concluding that "[t]he question is whether the totality of the circumstances justifies the force used during the arrest." *Id.* This is the test used to determine whether the force used in the course of an arrest is unreasonable in violation of the Fourth Amendment. *Graham v. Connor*, 490 U.S. 386, 395-97, 109 S.Ct. 1865, 1871-72, 104 L.Ed.2d 443 (1989).

Koon argues on appeal that the district court erred by drawing the definitions of both unlawful force and custody from the context of Fourth Amendment law, when the indictment charged him with depriving King of Fourteenth Amendment rights. According to Koon, the Fourteenth Amendment standard, which should have been applied in his case, affords greater protection to civil rights defendants, since under this standard, force is unlawful only if it is "shocking to the conscience" or "intended as punishment," rather than merely if it is "objectively unreasonable." Koon relies heavily on *United States v. Cobb*, 905 F.2d 784 (4th Cir. 1990), *cert. denied*, 498 U.S. 1049, 111 S.Ct. 758, 112 L.Ed.2d 778 (1991), a criminal prosecution brought under 18 U.S.C. § 242, in which the Fourth Circuit held that the district court had erred by giving a *Graham*-type excessive force instruction where the victim was a pretrial detainee, and hence where the victim's right to be free from excessive force was governed by the Fourteenth Amendment. *Id.* at 788-89.

We must determine whether Koon, like the defendant in *Cobb*, was entitled to have the jury instructed under the Fourteenth Amendment standard. We review de novo the question of whether a jury instruction correctly sets forth the elements of a statutory crime. *United States v. Reese*, 2 F.3d 870, 883 (9th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 928, 127 L.Ed.2d 220 (1994).

We conclude that the district court stated the law correctly. The indictment charged Koon with depriving King of Fourteenth Amendment rights. This circuit, like others, has recognized that a person in official custody has a right to be free from harm inflicted by third persons, and that an official who willfully subjects a custodial subject to a deprivation of that right is

subject to criminal liability. *United States v. Reese*, 2 F.3d at 887-90 (officials charged with violating victim's right to be kept free from harm while in custody); *United States v. McKenzie*, 768 F.2d 602, 604 (5th Cir. 1985) (same), *cert. denied*, 474 U.S. 1086, 106 S.Ct. 861, 88 L.Ed.2d 900 (1986); *United States v. Lynch*, 189 F.2d 476, 478 (5th Cir.) (officials charged with violating victims' right "not to be subjected to cruel and inhuman treatment or punishment while in custody, control, or under arrest"), *cert. denied*, 342 U.S. 831, 72 S.Ct. 50, 96 L.Ed. 629 (1951).[25]

The right of the custodial subject to be protected from harm is firmly rooted in substantive due process jurisprudence: "when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsiblity for his safety." *DeShaney v. Winnebago County Soc. Servs. Dept.*, 489 U.S. 189, 199-200, 109 S.Ct. 998, 1005-06, 103 L.Ed.2d 249 (1989).

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[25] There is another route to police officer liability under the civil rights statutes for injuries perpetrated by third persons. Pursuant to a long line of civil cases, police officers have a duty to intercede when their fellow officers violate the constitutional rights of a suspect or other citizen. *E.g., O'Neill v. Krzeminski*, 839 F.2d 9, 11 (2d Cir. 1988); *Byrd v. Clark*, 783 F.2d 1002, 1007 (11th Cir. 1986); *Brunner v. Dunaway*, 684 F.2d 422, 425-26 (6th Cir. 1982), *cert. denied*, 459 U.S. 1171, 103 S.Ct. 816, 74 L.Ed.2d 1014 (1983); *Putnam v. Gerloff*, 639 F.2d 415, 423 (8th Cir. 1981); *Byrd v. Brishke*, 466 F.2d 6 (7th Cir. 1972). In these cases, the constitutional right violated by the passive defendant is analytically the same as the right violated by the person who strikes the blows. Thus an officer who failed to intercede when his colleagues were depriving a victim of his Fourth Amendment right to be free from unreasonable force in the course of an arrest would, like his colleagues, be responsible for subjecting the victim to a deprivation of his Fourth Amendment rights.

The government chose not to rely on this line of authority in drafting the indictment, perhaps because *Byrd v. Brishke*, the leading case in this line, is explicitly premised on principles of tort liability. 466 F.2d at 10-11. We note that *Reese*, which was decided after the trial in this case, strongly suggests that *both* approaches are available in a criminal case. *See* 2 F.3d at 884 & n.20, 888-89.

In this circuit, that duty obtains not only when the victim is in custody, but also when the state has created the danger to which the victim is exposed. *Wood v. Ostrander*, 879 F.2d 583, 589-90 (9th Cir. 1989) (victim in high crime area raped when police officer impounded car in which victim was passenger, leaving her stranded), *cert. denied*, 498 U.S. 938, 111 S.Ct. 341, 112 L.Ed.2d 305 (1990); *L.W. v. Grubbs*, 974 F.2d 119 (9th Cir. 1992) (prison nurse raped by violent sex offender assigned to work with her; state knew offender was likely to rape again, but did not tell nurse of his proclivities), *cert. denied*, ___ U.S. ___, 113 S.Ct. 2442, 124 L.Ed.2d 660 (1993).

The right which is established in these substantive due process cases is not the narrow right to be protected from constitutional wrongs committed by third persons. Rather, because the individual has been placed in a dependent and helpless position, she is entitled to the broader right to be protected from *harm*. In *Lynch*, in *Grubbs*, and in *Wood*, the third persons who inflicted the victims' injuries, in fact, were not state actors. They were private citizens whose own actions could not have given rise to liability under § 242 or § 1983. The state actors—the defendants who failed to intervene, or who created the danger—were alone responsible for *constitutional* crimes or torts. These cases make clear that the "harm" from which the custodial victim has a right to be protected is not necessarily an independent constitutional violation but rather need be no more than a common-law crime or tort. Thus in this case, there was no reason for the court to instruct the jury that Koon was liable only if he permitted third persons to inflict force which would amount to an independent Fourteenth Amendment violation shocking to the conscience. Indeed, such an instruction would have been erroneous.

The district court instructed the jury that King had a right to be kept from "an unreasonable use of force" while in custody—a Fourth Amendment standard. This was altogether correct. If Powell, Briseno, and Wind had inflicted only those injuries they were permitted to inflict as police officers subduing an arrestee—if they had used only reasonable force—there would have been no harm from which Koon was obligated to protect King.

Because the third-party actors were officers attempting to make an arrest, Koon's Fourteenth Amendment duties to the custodial subject were to protect against only such force as was unreasonable.[26]

This analysis finds support in *Reese*, where, as here, a police sergeant was convicted under 18 U.S.C. § 242 of violating the rights of custodial subjects by deliberately failing to intervene as his officers beat them. 2 F.3d at 887-88, The excessive force instruction given to the jury set forth a Fourth Amendment test of reasonableness under the circumstances--and was approved by this court. 2 F.3d at 891, 898-99. *Reese* thus recognized a custodial subject's substantive due process right to be protected from Fourth Amendment violations by third persons.

Koon attempts to distinguish *Reese* by arguing that it was permissible for the court to give a Fourth Amendment excessive force instruction there only because the indictment in that case left it unclear as to whether the defendants were charged under the Fourth or the Fourteenth Amendment. As we have explained, however, even in the context of an alleged deprivation of Fourteenth Amendment rights, it was altogether proper for the district court to use a Fourth Amendment excessive force benchmark when describing the harm an officer was obligated to

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[26] That does not mean that Koon was criminally liable for *any* Fourth Amendment violation by the other officers. His criminal liability was premised on a *willful* failure to intercede. Thus if the blows had been struck so rapidly that Koon had no realistic opportunity to intervene, he would not be liable. *See O'Neill*, 839 F.2d at 11.

The district court recognized this point in its sentencing memorandum: Although the court suggested strongly that Briseno's stomp may have been a violation of King's Fourth Amendment rights, the court did not hold Koon accountable for that stomp, since it was so sudden that Koon could not have anticipated it. *Koon*, 833 F.Supp. at 779.

protect a custodial suspect from suffering at the hands of other police officers.[27]

Koon next contends that the jury should have been instructed that a person is in official custody only if he has been taken to "a police facility or other pretrial detention facility." But even assuming that the rights of all pretrial detainees to be free from excessive force are governed by substantive due process standards, this does not mean that a person has substantive due process rights only if he is a pretrial detainee. As in the § 242 cases cited above, King's right to protection arose when he came into custody—not when he was placed in a "facility."

The district court instructed the jury that a person is in official custody if, "in light of all circumstances surrounding the incident, a reasonable person in that situation would have believed he or she was not free to leave." RT 4/10/93 (Jury Instructions) at 16. Although this standard is taken from the Fourth Amendment case of *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S.Ct. 1870, 1877, 64 L.Ed.2d 497 (1980), the same definition of "custody" applies in the Fourteenth Amendment context. Indeed Koon does not suggest any alternative "Fourteenth Amendment" definition of custody. He offers only the logically fallacious argument that because all pretrial detainees have substantive due process rights, a person must be a pretrial detainee to enjoy those rights.

In any event, Koon's custody argument is laid to rest by *Reese*, in which the court upheld a conviction based on the defendant's willful deprivation of a victim's right to be kept free from harm while in official custody, the only "custody" relevant

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[27] Koon also points out that the defendants in *Reese* were charged with conspiracy, while he was not. The police sergeant in *Reese*, however, was charged with several substantive counts under 18 U.S.C. § 242 as well as with conspiracy under 18 U.S.C. § 241. The court upheld his conviction on both the conspiracy count and the substantive counts. 2 F.3d at 875, 877, 887-90.

to the counts on which defendant was convicted consisted of investigatory stops accompanied by pre-arrest scuffles between officers and suspects. 2 F.3d at 875, 877, 887-90. Since that much was clearly present in this case as well, the district court did not err by failing to tell the jury that it had to find more.[28]

2. *Willfulness*

The court gave the following instructions on willfulness:

[1] An act is done willfully if it is done voluntarily and intentionally, and with a specific intent to do something this law forbids; that is, with an intent to violate a protected right.

* * * * *

[2] In Count 1, the required specific intent is the intent to use more force than is reasonable under all of the circumstances.

[3] In Count 2, the required specific intent is the intent to refrain from protecting a person from an unreasonable use of force while that person is in official custody.

* * * * *

[4] It is not necessary for you to find that a defendant was thinking in constitutional terms at the time. You may find that a defendant acted with the required specific intent, even if you find that he had no real familiarity with the Constitution or with the particular constitutional right involved, provided that you find

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[28] Koon also argues that there was insufficient evidence to sustain his conviction under Fourteenth Amendment standards of force and custody. Since the jury was properly instructed as to the Fourth Amendment definitions of those terms, and Koon does not argue that the evidence was insufficient to sustain a conviction under those standards, Koon's sufficiency of the evidence argument fails.

that the defendant intended to accomplish that which the Constitution forbids.

[5] The government may meet its burden, even if the defendant was motivated by fear, anger, or some other emotion, provided that the intent which I have described to you is present.

* * * * *

[6] The term "willfully" as used in these instructions to describe the alleged state of mind of a defendant means that he knowingly acted or failed to act deliberately and intentionally as contrasted with accidentally, carelessly or unintentionally.

RT 4/10/93 (Jury Instructions) at 17-20.

Appellants concede that ¶¶ 2 and 3 are correct statements of the law. They contend, however, that the effect of ¶¶ 4, 5, and 6 was to allow the jury to convict on the basis of acts which were merely volitional, rather than undertaken with the specific intent to violate King's rights. If appellants are correct, the problem is serious: "the violation of a federally protected right and the specific intent to violate that right are *separate* elements of the crime established by [§ 242]." *Reese*, 2 F.3d at 884 (emphasis in original).

We review de novo whether the district court has correctly stated the law as to the elements of the crime, but review the manner of expression for abuse of discretion. *Id.* at 883. We must decide whether the jury instructions, taken "as a whole are misleading or inadequate to guide the jury's deliberation." *United States v. Joetzki*, 952 F.2d 1090, 1095 (9th Cir. 1991).

Paragraph 4 is a correct statement of the law. While it may appear paradoxical to say both that a defendant must have the specific intent to violate the Constitution and that the defendant may have that intent even if he is not "thinking in constitutional terms," this seeming paradox is explained by the fact that "willfulness" encompasses "'reckless disregard of a constitutional requirement that has been made specific and definite.'" *Reese*, 2 F.3d at 881 (quoting *Screws v. United*

States, 325 U.S. 91, 105, 65 S.Ct. 1031, 1037, 89 L.Ed. 1495 (1945)); *see also United States v. Gwaltney*, 790 F.2d 1378, 1386 (9th Cir. 1986), *cert. denied*, 479 U.S. 1104, 107 S.Ct. 1337, 94 L.Ed.2d 187 (1987). Indeed, the very language defendants complain of in ¶ 4 was approved by *Reese*.

Paragraph 5 is also correct. After noting that the government could meet its burden of proving specific intent even if a defendant was motivated by fear, anger, or some other emotion, the court reiterated that the government still had to prove "the intent which I have described to you." Since the court's earlier instruction defined specific intent correctly, this later instruction could not be incorrect unless the statement about motivation and emotions was somehow wrong. Appellants do not claim that it was.

Finally, ¶ 6 does not dilute the definitions of specific intent which appellants concede were correct. It simply makes clear that negligence or inadvertence do *not* amount to willfulness. This statement is far more helpful than hurtful to appellants.

We conclude that there was no error in the jury instructions.[29]

I. *Sufficiency of the Evidence to Support Powell's Conviction*

There is sufficient evidence to support a conviction if, "'reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the

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[29] Appellants also argue that in closing, the government misled the jury about the nature of the intent it was required to prove. The prosecutor stated that "[i]t is not, I repeat it is not, what these defendants think was reasonable. It is what a reasonable and ordinary police officer thinks is reasonable that is the standard you must employ." RT 4/10/93 (AM) at 99. That statement was made, however, "on the issue of reasonableness" of the force. *Id.* The statement did not refer to intent, which the prosecutor addressed earlier in his argument by reading from the instructions soon to be given by the court. The prosecutor kept specific intent (a subjective element) and reasonableness of the force under the Fourth Amendment (an objective element) quite distinct.

essential elements of a crime beyond a reasonable doubt.'" *United States v. Bishop*, 959 F.2d 820, 829 (9th Cir. 1992) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979)).

Powell contends that the evidence was insufficient to establish either the unreasonableness of the force he used or his willfulness. On the first point, he focuses only on the force used from 1:07 to 1:26 in the videotape—the period in which the district court, in its sentencing memorandum, concluded that criminal conduct occurred. Powell points out that with respect to earlier portions of the videotape, the district court concluded that his blows were a reasonable response to King's movements. Powell then argues that since King moved again after being stomped on by Briseno, the blows he inflicted after that also were reasonable.

We reject this argument. In reviewing the sufficiency of the evidence, we are not bound by the district court's findings at sentencing. The comparison Powell draws between the earlier and the later portions of the videotape, since it is based on the district court's sentencing memorandum, is without force in this context. But even if that were not so, Powell's argument fails as a factual matter. The district court found that the movement of King's body after Briseno's stomp was involuntary. Powell does not contend that there was insufficient evidence for the jury to have made this same finding, or to have found that he was aware of the involuntary nature of King's movements. It is simply disingenuous to say that an involuntary movement in response to a stomp poses the same threat as a voluntary movement made in an attempt to resist arrest.

Powell also argues that the evidence was insufficient to show that his actions from 1:07 to 1:26 were willful. He points out that he was not found guilty of being an aider and abettor of Briseno. However, since the jury acquitted Briseno (because it found the stomp to be reasonable, or because it found the stomp not to be a willful use of unreasonable force, or form some other reason we know not of), the jury had no basis for convicting Powell of aiding and abetting Briseno. 18 U.S.C. § 2; *United States v. Powell*, 806 F.2d 1421, 1424 (9th Cir. 1986) (in order

to sustain an aiding and abetting conviction, "courts in this circuit, as in others, continue to require evidence showing that a principal offense has been committed—including requiring evidence that some principal had the requisite intent"). Yet the jury could still find that Powell willfully used unreasonable force in delivering the blows that followed Briseno's stomp.

The videotape and the testimony of the government witnesses who interpreted it provided ample evidence that Powell's conduct was unreasonable. The jury was instructed that it was permitted to infer "that a person ordinarily intends all natural and probable consequences of an act knowingly done." RT 4/10/93 (Jury Instructions) at 18. That inference was available here, and would allow the jury to infer that unreasonable force was intended. In addition, Powell's remarks to the dispatcher after King had been handcuffed, and his remarks to King at the hospital were in themselves sufficient to support a finding of willfulness.

J. *Sentencing Issues*

Appellants were sentenced under § 2H1.4 of the United States Sentencing Commission *Guidelines Manual*, the provision pertaining to violations of 18 U.S.C. § 242. Section 2H1.4 provides for a base offense level of either 10, or 6 plus the offense level applicable to "any underlying offense," whichever is greater. "Underlying offense" is defined as "any offense under federal, state, or local law other than an offense that is itself covered under Chapter Two, Part H, Subpart 1." U.S.S.G. § 2H1.1, comment. (n.1).

In this case, the underlying offense was aggravated assault, which carries a base offense level of 15, U.S.S.G. § 2A2.2, to which was added 6 for a total of 21. The district court applied an upward adjustment of 4 for use of a dangerous weapon (U.S.S.G. § 2A2.2(b)(2)(B)), and a second upward adjustment of 2 for bodily injury (U.S.S.G. § 2A2.2(b)(3)(A)), for a total of 27.

The court declined to impose a four-level upward adjustment for serious bodily injury, because it found that King's serious injuries—a fractured leg, and head and facial injuries—

were sustained at a time when the officers were using lawful force. The court found that the force applied by the officers during the first 55 seconds of the Holliday videotape was a legitimate response to the threat King apparently posed. After 55 seconds, King became still. At 1:05, Briseno stomped on King's upper thorax, and King's body writhed involuntarily. Powell and Wind moved in and struck a new series of baton blows, between 1:07 and 1:26 on the videotape. These last blows, and these only, according to the district court, were unlawful. *Koon*, 833 F.Supp. at 779-80.

The district court departed downward five levels for victim misconduct and three levels based on a combination of other factors.[30] The government appeals from both of the downward departures and from the failure to adjust upward for serious bodily injury. We review de novo whether the district court had authority to depart. *United States v. Lira-Barraza*, 941 F.2d 745, 746 (9th Cir. 1991) (en banc). We review the factual findings concerning serious bodily injury for clear error. *United States v. Chapnick*, 963 F.2d 224, 226 (9th Cir. 1992).

The Sentencing Commission has instructed courts to treat each guideline as carving out a "heartland," defined as the "set of typical cases embodying the conduct that each guidelines describes." U.S.S.G. Ch. 1, Pt. A, § 4(b). Departure may be warranted in cases falling outside the heartland—atypical cases "to which a particular guideline linguistically applies but where conduct significantly differs from the norm." *Id.* The aggravating or mitigating circumstances which justify a departure must be circumstances of a kind or a degree "not adequately taken into consideration by the Sentencing Commission in formulating the guidelines." 18 U.S.C. § 3553(b); U.S.S.G. § 5K2.0, p.s.

Both Congress and the Sentencing Commission have placed restrictions on the types of factors which may be considered in

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[30] After the departures, the applicable range given a Criminal History Category of 1 was 30-37 months. Both appellants were sentenced to 30 months in prison.

sentencing. *E.g.*, 28 U.S.C. § 994(d); *see also* U.S.S.G. Ch. 1, Pt. A, § 4(b), intro. comment. We have frequently recognized that any sentence must be consistent with the structure of and the policies behind the federal sentencing statutes and the Guidelines. 18 U.S.C. § 3553(a); *United States v. Valdez-Gonzalez*, 957 F.2d 643, 647 (9th Cir. 1992); *United States v. Anders*, 956 F.2d 907, 914, (9th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1592, 123 L.Ed.2d 158 (1993).

1. *Three-Level Downward Departure*

The district court based the three-level downward departure on a combination of three factors: (1) the "additional punishment" appellants would receive on account of their unusual susceptibility to prison abuse and the administrative LAPD proceedings to which they would be subjected; (2) the extreme absence of a need to protect the public from future wrongdoing; and (3) the unfairness of successive state and federal prosecutions for the same conduct. The court recognized that none of these factors independently warranted a departure, but concluded that these factors taken together did justify a three-level departure. *Koon*, 833 F.Supp. at 786.

We do not quarrel with the district court's approach. Our circuit has recognized that although "[t]he [federal sentencing] statute speaks in the singular of 'mitigating circumstance,' ... [t]here is no reason to be so literal minded as to hold that a combination of factors cannot together constitute a mitigating circumstance." *United States v. Cook*, 938 F.2d 149, 153 (9th Cir. 1991). We have held that a "unique combination of factors" may constitute a "circumstance" that mitigates. *Id.; see also United States v. Floyd*, 945 F.2d 1096, 1099 (9th Cir. 1991), *corrected*, 956 F.2d 203 (9th Cir. 1992), *and subsequently superseded*, U.S.S.G. § 5H1.12; *Anders*, 956 F.2d at 911-14.

However, although a district court may grant a departure based on a combination of factors that do not individually justify a departure, this policy does not permit the district court to consider in the mix factors that should not be part of the consideration. "[T]he factors that go into [a] complex must be those at least authorized, and certainly not expressly prohibited, by the Sentencing Guidelines." *Anders*, 956 F.2d at 914. For

this reason, we first consider individually each of the factors identified by the court to determine if each is an appropriate part of the mix.

As we examine each factor, our purpose is not to determine whether each factor taken alone justifies a departure, but rather whether consideration of the particular factor at all as part of the decision to depart is consistent with the structure and purposes of the Guidelines and the federal sentencing statutes. Were we to determine that these factors constitute permissible grounds for a departure, we would then consider whether, taken in combination, these factors constitute a circumstance that mitigates.[31]

a. *Additional Punishment*

In granting the three-level downward departure, the district court relied in part on the fact that appellants would be subject to "additional punishment" that flowed from their convictions in addition to the court-imposed sentence. This "punishment" involved two types: (1) the multiplicity of additional administrative proceedings to which appellants would be subjected, and (2) the anticipated abuse in prison because of appellants' particular vulnerability. *Koon*, 833 F. Supp. at 788-

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[31] In our previous decisions considering departures based on a combination of factors, the district court has identified a *single* mitigating circumstance which unified these factors and justified a departure. For example, in *Floyd*, we found that a combination of factors - lack of education, imprisonment at age 17, and abandonment by parents - created the single mitigating circumstance of lack of youthful guidance. 945 F.2d at 1099 & N.2. Similarly, in *United States v. Fairless*, 975 F.2d 664 (9th Cir. 1992), we held that a combination of factors created the mitigating circumstance that the defendant's act of armed robbery was a single act of aberrant behavior. *Id.* at 666-69. In this case, by contrast, the district court did not suggest that the separate factors it identified combined to form a single mitigating circumstance, but instead identified three unrelated factors. Although we question whether the rationale we announced in *Cook* extends to cases in which a downward departure is based on a combination of *unrelated* factors we need not decide this issue because we conclude that none of the individual factors identified by the district court should have been considered in making the decision to depart.

89. The district court relied on separate analyses to justify these two types of "additional punishment."

i. *Additional Adversarial Proceedings*

The court recognized that, because of their convictions, appellants would be subjected to quasi-judicial administrative proceedings before the LAPD Board of Rights, resulting in appellants' loss of employment and tenure, their prospective disqualification from the field of law enforcement, and the anguish and disgrace of these deprivations. *Koon*, 833 F. Supp. at 789. The only case cited by the district court to support this departure is *United States v. Aguilar*, 994 F.2d 609 (9th Cir.), *op. withdrawn*, 11 F.3d 124 (1993), and *op. replaced on reh'g en banc*, 21 F.3d 1475 (1994), an opinion which has since been withdrawn and is no longer sound precedent.

As we have already noted, a district court may depart only "if the circumstance upon which it seeks to base its departure 'is consistent with the sentencing factors prescribed by Congress.'" *United States v. Pacheco-Osuna*, 23 F.2d 269, 271 (9th Cir. 1994) (quoting *Lira-Barruza*, 941 F.2d at 746.) Thus,

> [a]lthough § 3553(b) does not define the term "aggravating or mitigating circumstance," the term does suggest that a factor constitutes a permissible basis for departure *only if it speaks to the culpability of the defendant or the severity of the offense, or if it is otherwise related to some other congressionally-authorized legitimate sentencing concern.*

United States v. Crippen, 961 F.2d 882, 884 (9th Cir.) (emphasis added), *cert. denied*, ___ U.S. ___, 113 S.Ct. 438, 121 L.Ed.2d 358 (1992). "The list of factors relevant to sentencing includes the nature and seriousness of the offense, deterrence of criminal conduct, protection of the public from further crimes by the defendant, correctional treatment of the defendant, the history and characteristics of the defendant, . . . the need to avoid unwarranted sentencing disparities," promotion of respect for the law, and the provision of just punishment.

Pacheco-Osuna, 23 F.3d at 272; *see also Crippen*, 961 F.2d at 884; 18 U.S.C. § 3553(a).

In *United States v. Alvarez-Cardenas*, 902 F.2d 734 (9th Cir. 1990), we considered whether the fact that a defendant faced a threat of deportation was an appropriate fact to consider at sentencing. Reasoning that the threat of deportation was not a circumstance that spoke to the offense in question or to the offender's character, we concluded that the threat of deportation was irrelevant for sentencing purposes. *Id.* at 737. We subsequently noted that the threat of deportation did not fall within any of the sentencing factors set forth by Congress in § 3553(a). *Cripen*, 961 F.2d at 885.[32] Since our decision in *Alvarez-Cardenas*, we have refused to permit departures based on factors that do not speak to the offender's character, the nature or seriousness of the offense, or some other legitimate sentencing concern. *See United States v. Ullyses-Salazar*, 28 F.2d 932, 938 (9th Cir. 1994) (deterrence of government misconduct that has not persuaded defendant to break the law is not an appropriate ground for a departure); *Pacheco-Osuna*, 23 F.2d at 272 (same); *United States v. Williams*, 978 F.2d 1133, 1136 (9th Cir. 1992), *cert. denied*, ___ U.S., 113 S.Ct. 1606, 123 L.Ed.2d 168 (1993) (same).[33]

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[32] We also noted that the Sentencing Guidelines suggest that departures from the sentencing range prescribed by the Guidelines generally reflect the defendant's culpability and the seriousness of the offense. *Compare* U.S.S.G. § 5K2 (listing as grounds for departure factors based on the characteristic of the crime or on characteristics particular to the defendant's culpability or danger to society) *with* U.S.S.G. § 5H1 (factors that speak to the defendant's personal characteristics or to his status are generally not proper grounds for a departure).

[33] In stating that factors that speak to the nature and seriousness of the crime or to the offender's culpability are relevant to sentencing and to departure, we do not intend to imply that factors that do not speak to these issues are *never* relevant. *See Crippen*, 961 F.2d at 885 ("We do not mean to suggest that only factors which bear upon a defendant's personal history or upon the crime in question may be considered in sentencing. Courts may depart for other aggravating or mitigating circumstances"); U.S.S.G. Ch. 1, Pt. A, § 4(b) (with

[Footnote continued on next page]

Personal and professional consequences that stem from a criminal conviction are not appropriate grounds for departing, nor are they appropriately considered as part of a larger complex of factors. They are not tied to any penological purpose or legitimate sentencing concern expressed in the federal sentencing statutes.

Contrary to the district court's assumptions, sentences imposed under the Guidelines do not impose the only consequence of committing a crime, nor is it intended that they be the only consequence. To the contrary, the societal consequences that flow from a criminal conviction are virtually unlimited. Individuals may lose their jobs or be foreclosed from serving in future professions; their marriages are destroyed; they may be plunged into poverty. Some individuals may be deported, *see United States v. Alvarez-Cardenas*, 902 F.2d 734, 737 (9th Cir. 1990), while those who have been convicted of drug or racketeering offenses may lose their homes and their investments to the federal government in forfeiture proceedings. World class figure skaters may lose the right to compete in international competition. Virtually all individuals who are convicted of serious crimes suffer humiliation and shame, and many may be ostracized by their communities.

All of these consequences could be considered "additional punishments" that flow from conviction, yet seldom can one conceive of a situation in which these consequences form an appropriate basis for granting a departure. This is so because the criminal justice system cannot and does not attempt to be the

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[Footnote continued from previous page]

the exception of certain listed factors "that the court cannot take into account as grounds for a departure . . . the Commission does not intend to limit the kinds of factors, whether or not mentioned anywhere else in the guidelines, that could constitute grounds for departure in an unusual case."). We note only that "for a factor to be considered, it must be tied to *some* legitimate penological purpose or legitimate sentencing concern expressed in the Sentencing Reform Act." *Crippen*, 961 F.2d at 885. In most cases, these factors will speak to the nature and seriousness of the defendant's crime or to his culpability.

sole arbiter of the consequences of criminal acts. To permit the system to assume such a role would create a system of sentencing that would be boundless in the moral, social, and psychological examinations it required courts to make. *See United States v. Walker*, 27 F.2d 417, 419 (9th Cir. 1994) (refusing to hold that post-arrest emotional trauma is a valid ground for a departure and noting that if it did, every arrestee would request a departure on that basis and that courts would be powerless to separate the valid claims from the invalid). Given the range of possible "additional punishments" that a court might consider when sentencing, the district court's suggested approach can only lead to huge disparities in sentences, thereby conflicting with one of the overriding purposes of the Sentencing Guidelines: the reduction of sentencing disparities between individuals who have committed equivalent crimes. *See* 28 U.S.C. §§ 991(b)(1)(B) & 994(f). A related concern is the ease with which this factor can be used to justify departures that are based, either consciously or unconsciously, on the defendant's socioeconomic status, a factor that is *never* a permissible basis for a departure. *See* U.S.S.G. § 5H1.10.

As a final matter, the consequences of conviction identified by the court as a basis for downward departure are troubling because they stem from the fact that appellants, as police officers, held positions of trust and respected status in society and have abused this trust. *See Koon*, 833 F. Supp. at 789 ("[i]n short, because Koon and Powell are police officers, certain unique burdens flow from their convictions"). Rather than reducing a punishment for such individuals, the Guidelines would enhance the punishment, viewing persons who abuse their positions of trust as more culpable than those offenders who do not hold such a position. U.S.S.G. § 3B1.3 comment. (backg'd).

In sum, we conclude that the district court's reliance on the "additional punishment" flowing from appellants' criminal conviction was impermissible.

ii. *Extreme vulnerability to prison abuse*

In addition to relying on the "additional punishment" that flows from criminal conviction, the district court considered as "additional punishment" appellants' potential extreme vulnerability to abuse in prison. The court noted that the "widespread publicity and emotional outrage which have surrounded this case from the outset, in addition to the defendants' status as police officers, lead the Court to find that Koon and Powell are particularly likely to be targets of abuse during their incarceration." *Koon*, 833 F. Supp. at 788. In justifying this basis for the departure, the district court relied on two opinions from the Second Circuit which affirmed a downward departure based on the defendant's "extreme vulnerability" to prison abuse. *United States v. Gonzalez*, 945 F.2d 525 (2d Cir. 1991); *United States v. Lara*, 905 F.2d 599 (2d Cir. 1990).

In *Lara*, the Second Circuit upheld a departure where the defendant had previously been victimized "as a consequence of his diminutive size, immature appearance and bisexual orientation," and the only way to protect him was to place him in solitary confinement. 905 F.2d at 601. The court held that although the Sentencing Commission had considered the vulnerability of offenders to physical attack in prison when it formulated the Guidelines, *see* 28 U.S.C. § 994(g), it did not consider vulnerability to the extent present in the case before it—"where the only means for prison officials to protect [the defendant] was to place him in solitary confinement." *Id.* at 604. The Second Circuit subsequently extended this analysis in *Gonzalez*, where it approved a downward departure for a defendant who was small, feminine-looking, and had the appearance of a fourteen year old, even though there was no history of prior prison abuse and no indication that the defendant would be placed in solitary confinement. 945 F.2d at 526-27.

Although our circuit has never upheld a downward departure on the grounds of extreme vulnerability to prison abuse, we have implied that such a departure might be appropriate in certain circumstances. *United States v. Martinez-*

Guerrero, 987 F.2d 618, 620 (9th Cir. 1993). However, the extension of the Second Circuit's cases to appellants' case is problematic because appellants' vulnerability rests solely on their status as police officers and on the public outrage that their crime engendered. In contrast, in *Martinez-Guerrero*, we understood the Second Circuit's cases to rely primarily upon the defendant's *physical* characteristics, including the individual's age, mental condition, and the existence of physical impairments. *Id.* at 620-21; *see also* U.S.S.G. §§ 5H1.1, 5H1.3, 5H1.4. We agreed that an extraordinary physical impairment might provide a reason for a departure but concluded that legal blindness did not constitute such an impairment. *Id.*; *see also United States v. Garza-Juarez*, 992 F.2d 896 (9th Cir. 1993) (affirming downward departure based in part on serious mental disorder that causes defendant to suffer from panic attacks with agoraphobia), *cert. denied*, ___ U.S. ___, 114 S.Ct. 724, 126 L.Ed.2d 688 (1994); *United States v. Long*, 977 F.2d 1264, 1277 (8th Cir. 1992) ("an extraordinary physical impairment that results in extreme vulnerability is a legitimate basis for departure").

Thus, although we have recognized the possibility of basing a departure on an extraordinary physical impairment, we have never extended this analysis to include departure based on an individual's occupation or his notoriety. We decline to do so today on the grounds that in this case such a departure would be inconsistent with the structure and policies of the Guidelines.

Although it is true that police officers, as a group, are unpopular with prison inmates and are vulnerable to abuse in prison, the reliance *solely* on hostility toward a group of which the defendant is a member provides an unlimited open-ended rationale for departing. While a departure based on U.S.S.G. § 5H1.4 involves the relatively objective question of whether an extraordinary physical impairment exists, the determination of whether an individual's membership in a group regarded with hostility leaves him vulnerable is both subjective and open-ended. Nothing would prevent this rationale from being applied to numerous groups—such as gang members who may face increased abuse from members of a rival gang, police informants, or child abusers—all of whom face an increased risk

of abuse in prison. Because the number of defendants who might qualify for this departure is virtually unlimited, acceptance of this basis for departure would subvert the Guidelines' goal of reducing unwarranted disparities in sentencing. 18 U.S.C.A. § 3553(a)(6).[34]

Extension of the Second Circuit's cases to appellants' case is troubling for another reason as well. Unlike the physical vulnerability cases in which the departure is grounded on factors over which the defendant has little or no control, in this case the vulnerability to prison abuse arises directly from the public's awareness of appellants' crime. Any public outrage was the direct result of appellants' criminal acts. It is incongruous and inappropriate to reduce appellants' sentences specifically because individuals in society have condemned their acts as criminal and an abuse of the trust that society placed in them. We therefore conclude that a downward departure based on public outrage over the crime that was committed is contrary to the Guidelines' goals of promoting respect for the law and imposing sentences that reflect the seriousness of the crime. *See* 18 U.S.C.A. § 3553(a)(2)(A).[35]

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[34] Contrary to the situation in *Lara*, nothing in the record suggests that appellants must be placed in a continuous solitary confinement in order to protect them from abuse in prison. We are not faced with a situation in which the punishment imposed by the criminal justice system is far harsher than ordinary, and thus we do not decide whether a downward departure in such a situation is permissible.

[35] We recognize that this case received exceptional media coverage and that the Holliday videotape was viewed worldwide. Thus, contrary to most cases in which a police officer stands accused of unlawfully depriving a citizen of her civil rights, the entire world was aware of the arrest of Rodney King. The district court was therefore correct that the publicity and emotional outrate that have surrounded this case are exceptional. However, such a fortuity is an insufficient basis for granting a downward departure.

b. *Absence of a Need to Protect the Public*

The second factor relied on by the district court in granting the three-level downward departure is the absence of any need to protect the public from future misconduct by appellants. *Koon*, 833 F. Supp. at 789-90. The district court reasoned that the federal sentencing statutes require it to consider the need to protect the public from further criminal activity, *see* 18 U.S.C. § 3553(a)(2)(C), and concluded that because neither Koon nor Powell is dangerous or likely to engage in future criminal conduct, the sentence imposed need not reflect the need to protect the public. *Id.* at 790.

In its opinion, the district court recognized that the Guidelines consider the need for public protection by factoring a defendant's criminal history into the calculation of the sentence. *See* U.S.S.G. Ch. 4, Pt. A, intro. comment. Thus, the Guidelines specifically provide that first-time offenders like Koon and Powell should be classified in Criminal History Category 1, U.S.S.G. §§ 4A1.1, 4A1.3, Ch. 5, Pt. A. However, the court reasoned that

> Koon and Powell fall into the lowest criminal history category, along with first-time offenders who may manifest a violent nature or a potential for recidivism. Within Criminal History Category I, the Guidelines do not adequately distinguish defendants who, for a variety of reasons, are particularly likely to commit crimes in the future. Here, the need to protect the public from the defendants' future criminal conduct is absent "to a degree" not contemplated by the Guidelines.

Koon, 833 F. Supp. at 790 n. 20.

We are sympathetic to the district court's belief that appellants' low likelihood of recidivism should be relevant in fashioning a sentence. However, the fact that appellants are neither dangerous nor likely to commit crimes in the future is not an appropriate basis for a departure in this case. Although it is true that some offenders who are classified in Criminal

History Category I have a greater likelihood of recidivism than appellants, the Commission already took this factor into account when it drafted the Guidelines, which provide:

> The lower limit of the range for a Category I criminal history is set for a first time offender with the lowest risk of recidivism. Therefore, a departure below the lower limit of the guideline range for Criminal History Category I on the basis of the adequacy of criminal history cannot be appropriate.

U.S.S.G. § 4A1.3, p.s.

Thus, the Commission has expressly disapproved of sentencing courts' departing below the range for the category that already reflects the lowest risk. This is so even for defendants who may be unusually unlikely to commit crimes in the future. For this reason, a downward departure based on these grounds is inconsistent with the Sentencing Guidelines. *See United States v. Farah*, 991 F.2d 1065, 1070 (2d Cir. 1993); *United States v. Mogel*, 956 F.2d 1555, 1563 (11th Cir.), *cert. denied*, ___ U.S. ___, 113 S.Ct. 167, 121 L.Ed.2d 115 (1992).[36]

c. *Successive State and Federal Prosecutions*

The third and final factor cited by the district court in granting a three level departure is the "spectre of unfairness" and the burden on the defendants created by successive state and federal prosecutions. *Koon*, 833 F. Supp. at 790. As the district court properly recognized, the federal prosecution of Koon and Powell did not violate the Fifth Amendment's prohibition against double jeopardy: under the doctrine of "dual sovereignty," the state and federal governments may each prosecute an individual for the same act when the act violates

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[36] In a similar context, we have relied on these policy statements in the Guidelines to hold that a downward departure from Criminal History Category I cannot be based on the defendant's "absolutely clean prior record." *United States v. Berlier*, 948 F.2d 1093, 1095 (9th Cir. 1991).

each sovereign's respective laws. *Heath v. Alabama*, 474 U.S. 82, 89, 106 S.Ct. 433, 437, 88 L.Ed.2d 387 (1985). However, the court concluded that the federal conviction following a state acquittal raises a "spectre of unfairness" that imposes unique burdens on appellants and supports a downward departure. *Koon*, 833 F. Supp. at 790.

Reliance on the "spectre of unfairness" of dual prosecutions to support a departure is improper because it speaks neither to the culpability of the defendant, the severity of the offense, nor to some other legitimate sentencing concern. *See Crippen*, 961 F.2d at 884. To the contrary, application of this factor directly conflicts with the court's mandate to impose a sentence that "reflect[s] the seriousness of the offense." 18 U.S.C. § 3553(a)(2)(A). Once the state has prosecuted an individual for a criminal act, the federal government will undertake a successive prosecution only when the Attorney General decides that the earlier state prosecution did not vindicate "compelling [f]ederal interests." *United States v. Snell*, 592 F.2d 1083, 1087-88 (9th Cir.), *cert. denied*, 442 U.S. 944, 99 S.Ct. 2889, 61 L.Ed.2d 315 (1979). In this case, the Attorney General's authorization of a federal prosecution necessarily reflected the conclusion that the distinct federal interests in protecting the constitutional rights of citizens to be free from unreasonable force at the hands of government had not been adequately vindicated in the state court proceeding. To *reduce* a sentence in these circumstances is in direct conflict with the Guidelines. We find nothing in the structure or policies of the Guidelines to support a departure on the grounds that successive prosecutions are burdensome. *See United States v. Woodard*, 927 F.2d 433, 435 (8th Cir.) (rejecting argument that prior state prosecution for same conduct should lead to a more lenient sentence), *cert. denied*, ___ U.S. ___, 112 S.Ct. 246, 116 L.Ed.2d 201 (1991).

In sum, we conclude that consideration of any of the factors identified by the district court to support the three-level departure, separately or collectively, is, under the facts of this case, inconsistent with the structure and policies of the Guidelines. These factors are improper grounds on which to rest a departure.

2. Five-Level Downward Departure

In support of the five-level departure, the district court cited U.S.S.G. § 5K2.10, p.s., which states that a court may sentence below the Guidelines range "[i]f the victim's wrongful conduct contributed significantly to provoking the offense behavior." The government contends that departing on this basis was erroneous because, generally speaking, victim misconduct does not remove a criminal prosecution against a police officer from the heartland of cases to which 18 U.S.C. § 242 and U.S.S.G. § 2H1.4 apply. The government observes that police officers as part of their job must interact on a regular basis with persons who break the law; victim misconduct is the norm, not the exception. The government also points out that police officers, unlike civilians, are carefully trained on how to respond appropriately to misconduct, and how to avoid becoming provoked and overreacting; hence, the government argues, provocation is less exculpatory in a police misconduct case.

A close examination of the district court's sentencing memorandum reveals that the court ultimately did not conclude that appellants were provoked in precisely the manner contemplated by § 5K2.10. The guidelines requires that the victim's wrongful conduct "contributed significantly to provoking the offense behavior." After summarizing King's misconduct—speeding, driving while intoxicated, fleeing in his car from pursuing officers, refusing to obey the officers' commands to get on the ground and remain prone, attempting to escape from police custody, charging Powell—the court acknowledged that

> Mr. King's provocative behavior eventually subsided. The Court recognizes that by the time the defendants' conduct crossed the line to unlawfulness, Mr. King was no longer resisting arrest. He posed no objective threat, and the defendants had no reasonable perception of danger.

Koon, 933 F. Supp. at 787. The court concluded that King's wrongful conduct was "[t]he *initial* provocation for the subsequent course of events," that "the defendants' *early* perception of Mr. King as dangerous was reasonable," and that

Koon and Powell "at least *initially*[] were invited to use force." *Id.* at 786-87 (emphasis added). The court found that many of the factors which are relevant in determining the extent of departure under § 5K2.10—features which the district court also viewed as relevant in deciding whether to depart at all, *id.*, at 787 & n.13—weighed in favor of appellants with respect to appellants' *initial, lawful conduct*. But the court found that these factors were no longer present when appellants' conduct became criminal. The court recognized that by the time Powell struck, and Koon permitted to be struck, those blows for which appellants were criminally liable, King no longer presented a danger, no longer reasonably appeared to present a danger, and was no longer persisting in misconduct. *Id.* at 787; *see* U.S.S.G. § 5K2.10(b)-(d).

The district court thus determined not that King's misconduct "provoked" the offense conduct—the "provocative" behavior had "subsided" before appellants committed their criminal acts—but rather that "the incident would not have escalated to this point, indeed it would not have occurred at all, but for Mr. King's initial misconduct." *Koon*, 833 F. Supp. at 787. "But-for" causation, however, is not the proper analysis under § 5K2.10. But-for causation is a much less demanding standard than provocation; indeed, such a standard does not require victim misconduct at all. By relying on the concept of but-for causation, the district court implicitly recognized that § 5K2.10 does not apply, at least not in the usual sense.

After concluding that King's provocative behavior had subsided before appellants committed the offense conduct, the district court provided the following justification for the departure:

> Because the defendants were convicted of violation of 18 U.S.C. § 242, Guideline Section 2H4.1 for interference with civil rights under color of law, and Guideline Section 2A2.2, for aggravated assault linguistically apply. However, Mr. King's wrongdoing and the substantial role it played in bringing about the defendants' unlawful conduct remove this case from the "heartland" of offenses contemplated by the aggravated

assault Guideline. *See* Guidelines, Ch. 1, Pt. A, § 4(b).

Messrs. Koon and Powell were convicted of conduct which began as a legal use of force against a resistant suspect and subsequently crossed the line to unlawfulness, all in a matter of seconds, during the course of a dynamic arrest situation. However, the convicted offenses fall under the same Guideline Sections that would apply to a jailor, correctional officer, police officer or other state agent who intentionally used a dangerous weapon to assault an inmate, without legitimate cause to initiate a use of force.

The two situations are clearly different. Police officers are always armed with "dangerous weapons" and may legitimately employ those weapons to administer reasonable force. Where an officer's initial use of force is provoked and lawful, the line between a legal arrest and an unlawful deprivation of civil rights within the aggravated assault Guideline is relatively thin. The stringent aggravated assault Guideline, along with its upward adjustments for use of a deadly weapon and bodily injury, contemplates a range of offenses involving deliberate and unprovoked assaultive conduct. The Guidelines do not adequately account for differences between such "heartland" offenses and the case at hand.

The criminal conduct of a state officer who launches an unprovoked assault on an individual in custody is dissimilar to the conduct of defendants Koon and Powell who, at least initially, were incited to use force. Consistent with the policy of the Guidelines, the sentence imposed must reflect this disparity.

Koon, 833 F. Supp. at 787.

The district court ultimately focused not on provocation itself but rather on the volatility of the incident, and the close proximity between, on the one hand, the victim's misconduct

and the officers' concomitant lawful use of force, and, on the other hand, the appellants' unlawful use or authorization of the use of force. We must determine whether this basis for departure—as opposed to a more straightforward application of § 5K2.10—is legally permissible.

We begin by noting that in *Graham v. Connor*, the Supreme Court, in formulating the test for the evaluation of excessive force claims under the Fourth Amendment, recognized that

> [t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.

490 U.S. at 396-97, 109 S.Ct. at 1872. Thus *before* a use of force can be found excessive, the *Graham* "calculus," embracing the very factor which the district court found to be unusual in this case—the "dynamic arrest situation""—has been taken into consideration. The quoted language from *Graham* was included in the jury instructions in this case, and was reiterated by the government in closing. The incorporation of this consideration into the basic fabric of the law in this area strongly suggests that provocation by the victim in a situation where an officer must act instantly is typical--not unusual.

This case differs in one respect from many of the cases in which the *Graham* standard has been applied. The bulk of those cases are civil. In this criminal prosecution, in addition to proving that Powell used and Koon permitted officers under his command to use excessive force, the government was required to prove beyond a reasonable doubt that appellants intended to subject King to a deprivation of his civil rights. This required the jury once again to take the *Graham* factors into account, and required the government to make the difficult showing that appellants *willfully* came down on the wrong side of the *Graham* standard. **Thus the feature which the district court found unusual, and exculpatory, is built into the most fundamental structure of excessive force jurisprudence, and in criminal cases is built in twice.**

The district court was troubled by the fact that U.S.S.G. § 2H1.4 applies both to excessive force cases of the *Graham* variety and to cases in which a law enforcement or corrections officer applies force which is unlawful from the beginning. The district court saw the appellants' lawful authority to use or allow the use of *some* force, and what it perceived as the slenderness of the line between legitimate and illegitimate force, as factors partially exculpating appellants. Section 2H1.4, however, adopts exactly the opposite approach. The guideline punishes those vested with governmental authority *more* severely than private actors who are guilty of comparable conduct: this is the reason the guideline starts with the "underlying" offense and then increases the offense level by 6. *See* U.S.S.G. § 2H1.4, comment. (backg'd); *see also* U.S.S.G. § 3B1.3, comment. (backg'd). The fact that appellants were authorized to use *some* force in this case does not mitigate the fact that they used too much. Under the structure and policies of the Guidelines, it makes it worse.

In a great many § 242 cases, the defendant has authority to use appropriate force. The district court's rationale for departure in this case was that here, due to the victim's misconduct, the officers were legitimately called upon to use force *in this particular incident*, and that the incident itself was so volatile that legal force quickly became illegal. But the policy behind the punitive structure of § 2H1.4 does not apply any less to an officer who crosses the line into illegality *after* he begins to apply force to a victim than it does to the officer who crosses that line *as soon as* he begins to hurt the victim. The policy behind the guideline applies with equal or greater force in the former case; the victim who is a wrongdoer is especially vulnerable to abuses by officials, because the legitimate sway of authority over him is greater to begin with. The structure of § 2H1.4 suggests that the slenderness of the line separating legal from illegal uses of state power is a reason for victims, and for

society, to be especially concerned. It cannot at the same time be a reason to partially excuse those who transgress.[37]

As justification for the five-level departure, the district court relied not only on the conclusion that appellants' offense conduct fell outside the heartland of § 2H1.4 cases, but also on the conclusion that it fell outside the heartland of *aggravated assault* cases (i.e., § 2A2.2). "The stringent aggravated assault Guideline . . . contemplates a range of offenses involving deliberate and unprovoked assaultive conduct. The Guidelines do not adequately account for differences between such 'heartland' offenses and the case at hand." *Koon*, 833 F. Supp. at 787. The district court thus drew an implicit contrast between appellants and *civilian* offenders, noting that "Koon and Powell did not seek out a victim; rather, their very presence at the scene was a consequence of Mr. King's wrongful conduct." *Id.* Similarly, the court noted that "[p]olice officers are always armed with 'dangerous weapons'"—thereby suggesting that

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[37] The fact that § 2H1.4, like § 242, encompasses different kinds and degrees of misconduct is in itself insufficient to justify a downward departure. *See United States v. LeBlanc*, 24 F.2d 340, 347 (1st Cir. 1994) (although money laundering offenses which stem from prior unlawful activity of running an illegal gambling business differ from the "classic" offense of laundering drug money, downward departure is impermissible because the offense at issue falls within the plain language of the statute and clearly was intended to be reached by Congress.) Appellants' conduct fell squarely within § 242; the statute criminalizes the deprivation of *all* Constitutional rights. *United States v. Price*, 383 U.S. 787, 8003, 86 S. Ct. 1152, 1161, 16 L.Ed.2d 267 (1966) (discussing legislative history). Hence "once a due process right has been made specific by court decisions, that right is encompassed by § 242." *United States v. Langer*, 958 F.2d 522, 524 (2d Cir. 1992) (internal quotation marks and citations omitted). The rights King was deprived of have been clearly established for decades, and willful conduct which deprived him of those rights falls within the heartland of both the statute and the Guidelines. The fact that willful violators of the rights at issue in this case may not be prosecuted as often as other violators of § 242 does not alter the analysis. In itself it says nothing about individual culpability, although it may say something about evidentiary difficulties and about the litigation strategies of the federal government.

application of the weapons enhancement may be unfair in a case where the defendant is a police officer rather than a civilian. *Id.*

But to depart because of a perception that this case falls outside the heartland of aggravated assault cases again subverts the structure of § 2H1.4. That guideline explicitly enhances sentences for official misconduct *beyond* those for civilian misconduct. The Sentencing Commission cannot have been blind to the fact that the circumstances out of which official misconduct arises are different from the circumstances which give rise to civilian misconduct. The Commission, in fact, recognized those differences and used them as the basis for harsher rather than more lenient punishment.

We conclude that the district court's rationale for departing downward is flawed. The court isolated as unusual a factor which is at the very heart of excessive force jurisprudence. The court also adopted an approach toward official misconduct which is antithetical to the approach embodied in the applicable guideline. The five-level downward departure was not justified.[38]

3. *Failure to Adjust Upward Four Points for Serious Bodily Injury*

The district court imposed a two-level upward adjustment for bodily injury under U.S.S.G. § 2A2.2(b)(3)(A), rather than a

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[38] We do not conclude that a departure for victim misconduct would *never* be permissible in a public case. Such a departure might be appropriate, where, for example, the victim kills or wounds an officer's partner in his presence. In such a case, victim misconduct plays a role similar to that played by provocation in the more usual crimes of passion: the defendant is to a certain extent excused because he was seized by passion, and acted in the heat of the moment. This appears to have been the rationale in those cases where departures under § 5K2.10 were affirmed. *See United States v. Tsosie*, 14 F.3d 1438 (10th Cir. 1994); *United States v. Yellow Earrings*, 891 F.2d 650 (8th Cir. 1989) (assaults triggered by sexual jealousy or humiliation). This is distinguishable from the district court's rationale, which relies on the vicissitudes of police work, and the difficulty in drawing the line between proper and improper uses of force.

four-level adjustment for serious bodily injury under U.S.S.G. § 2A2.2(b)(3)(B). The government argues that the latter adjustment is warranted by the blow, administered by Powell 43 seconds into the videotape, which fractured King's leg. The district court acknowledged that this blow caused serious bodily injury, but found that Powell was not acting criminally when he delivered it.

As the government points out, the district court left it unclear whether or not the blow in question constituted excessive force: the court found that the blow "may have been tortious," 833 F.Supp. at 778, but concluded that Powell was not *criminally* liable for the blow, because the court was unable to find that he had intended at that time to use excessive force.[39] *Id.* It is the latter conclusion which the government attacks on appeal.

The district court supported its findings with the following observations: (1) blows to the leg joints are within LAPD policy, if necessary to avert a threat; (2) preceding the blow, the situation had evolved rapidly, and (3) King had tried to rise; (4) even as Powell delivered blows around the time of second 43, King continued to move, and to resist attempts to place him into the felony-prone position. *Id.*

The government contends that these reasons cannot be sustained, and musters countervailing evidence of its own: (1) there is a presumption that people who use unreasonable force know that it is unreasonable; (2) both Koon and Powell showed an awareness of wrongdoing after the event (by lying and by bragging); 3) Koon and Powell had been taught not to use a baton on a suspect, unless the suspect is combative or aggressive; and (4) there is no reason to distinguish the leg-breaking blow from the later blows which th court found *were* criminal.

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[39] The district court made the same finding with respect to Koon's criminal liability for the leg injury, and for the same reasons. *Koon*, 833 F.Supp. at 779-80. In the remainder of this discussion, references to Powell's liability refer to Koon's as well.

None of these arguments establishes that the district court committed clear error.

First, the district court was not bound to embrace the presumption which the government contends should apply. The court's specific findings of fact override general presumptions.

Second, the fact that Koon and Powell may have been conscious of guilt does not show *when* their criminal wrongdoing occurred. Their lies and boasts may have been directed to the later conduct which the district court found was criminal, and not to the earlier conduct. The later blows caused only soft tissue bruising.

Even if Powell's most damaging blow was not authorized by LAPD policy, this does not mean that Powell necessarily intended to use unreasonable force. Police department policy permitted blows to forestall aggressive or combative behavior, and the district court found that King was continuing to move at the time. While such movement may not in fact have been aggressive, it may have appeared so. Powell's reaction could reasonably be found to be an error of judgment rather than an intentional use of excessive force.

Finally, the district court provided a reason to distinguish between the officers' intent at the time of the leg-breaking blow and their intent during the 19 seconds of the videotape in which the court concluded that criminal activity occurred. Those latter 19 seconds were preceded by a period in which King lay on his stomach, and posed no threat. *Koon*, 833 F.Supp. at 777. The court found no comparable period of compliance preceding the leg-breaking blow.

The government quarrels with the evidentiary basis for this latter finding, and contends that both the Holliday videotape and the testimony of government witnesses establish that King ceased to pose a threat, at the very latest, 30 seconds into the tape. But the defense witnesses testified that King continued to pose a threat at that time. The district court concluded that the videotape was "sometimes an ambiguous record of the crucial events," *id.* at 776, and the conflicting testimony at trial bore this out. Although we may not agree, the district court resolved

those ambiguities in favor of the defense. Its resolution was not inconsistent with the verdicts, and the government has not established clear error.

CONCLUSION

We affirm appellants' convictions. After a careful review of the record and the relevant authorities, we are convinced that the district judge correctly resolved each of the legal issues raised by appellants as to the guilt phase of the proceedings. He conducted the trial with impeccable fairness and careful and thoughtful attention to its every aspect. We appreciate the magnitude of the task, given the unusual number of complexity of the issues involved, and the difficult circumstances caused by the extraordinary publicity surrounding every phase of the proceedings. However, we are also convinced that the sentences imposed by the district court are inconsistent with the structure and policies of the Sentencing Guidelines and the federal sentencing statutes, and we therefore vacate the sentences and remand for resentencing consistent with this opinion.

AFFIRMED IN PART; VACATED IN PART AND REMANDED FOR RESENTENCING.

APPENDIX B

UNITED STATES of America, Plaintiff-Appellee, Cross-Appellant,

v.

Stacey C. KOON, Defendant-Appellant, Cross-Appellee.

UNITED STATES of America, Plaintiff-Appellee, Cross-Appellant,

v.

Laurence M. POWELL, Defendant-Appellant, Cross-Appellee.

Nos. 93-50561, 93-50608, 93-50562 and 93-50609

United States Court of Appeals,
Ninth Circuit.

Filed January 12, 1995
Amended February 2, 1995

ORDER AND AMENDED DISSENT AND CONCURRENCE

Before: BROWNING and FLETCHER, Circuit Judges, and FITZGERALD,* District Judge.

All of the panel members have voted to deny the petitions for rehearing of both defendants.

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*Honorable James M. Fitzgerald, Senior United States District Judge for the District of Alaska, sitting by designation.

Judge BROWNING and Judge FLETCHER have voted to reject the suggestions for rehearing en banc of both defendants and Judge FITZGERALD has so recommended.

The full court was advised of the suggestion for rehearing en banc. A judge of the court requested a vote as to whether to take the case en banc. A vote was taken. The request failed to secure the affirmative vote of a majority of the active non-recused members of the court. Judge Trott was recused.

The petitions for rehearing of both defendants are denied and the suggestions for rehearing en banc of both defendants are rejected.

REINHARDT, Circuit Judge, dissenting, with whom PREGERSON, WIGGINS, KOZINSKI, NOONAN, and HAWKINS, Circuit Judges, join, and with whom O'SCANNLAIN, T.G. NELSON, and KLEINFELD, Circuit Judges, join, except as to Part IV:

REINHARDT, Circuit Judge, dissenting.

I dissent from the refusal to rehear this case en banc. While I agree that there is no prejudicial error that requires reversal of the convictions, I believe that the panel seriously erred in vacating the downward departures ordered by Judge Davies. In my opinion, the district court acted well within its discretion in sentencing the defendants to prison terms below the Guidelines range. Sergeant Koon and Officer Powell were first-time offenders. The sentences ordered by Judge Davies were severe indeed. Neither law nor justice requires that they be set aside or that any longer prison terms be imposed.

In stretching to reach its result, the panel casts aside the basic principles that should underlie judicial sentencing, even in the age of the Guidelines. It is only by exhalting the rigid calculations of charts and tables over the judgment of human beings that the panel reaches its conclusion that Judge Davies was too lenient. The panel's encroachment on district court discretion epitomizes the mechanical and inflexible approach to

sentencing that so many critics contend the Guidelines themselves represent.[1] Indeed, under the panel's view of the district judge's role in sentencing, district courts would be divested of much of the limited discretion they retain under the Guidelines. As a result, the panel's opinion would make far worse an already unfair and unjust sentencing scheme. It is difficult to believe that the panel truly wishes such an approach to apply to defendants generally.

The panel's unduly restrictive approach to Guidelines sentencing is not the sole vice in its opinion. The opinion is both internally inconsistent and in direct conflict with our prior holdings. As a result, it does not even have the virtue of clarifying our departure jurisprudence. By refusing to use the en banc process, we miss an important opportunity to provide district judges, including Judge Davies on remand, with clear guidance in the area of downward departures and leave them with little choice but to pick and choose among our various irreconcilable statements.

I.

The district judge sentenced Koon and Powell to 30-month prison terms. He determined the sentences to be appropriate after departing downward from the Guidelines range by a total of eight points. First, he concluded that a three-point departure was in order because of the presence of an unusual combination of factors. Second, he concluded that a five-point departure was justified as a result of victim misconduct. The sentence was entirely consistent with the Guidelines.

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[1] *See e.g.* Hon. Jose A. Cabranes, *Sentencing Guidelines: A Failed Utopian Experiment,* Nat'l L.J., July 27, 1992 at 2 (Circuit Judge, United States Court of Appeals for the 2d Circuit); Hon. Jack B. Weinstein, *A Trial Judge's Second Impression of the Federal Sentencing Guidelines,* 66 S. Cal. L. Rev. 357 (1992) (U.S. District Judge, Eastern District of New York).

The Guidelines are clear that a sentencing judge may depart downward from the Guidelines in "atypical" or "unusual" cases. U.S.S.G. Ch. 1, Pt.A, § 4(b) and § 5K2.O. Moreover, we have noted that, except for a small set of *prohibited* factors, "'the Commission does not intend to limit the kinds of factors, whether or not mentioned elsewhere in the guidelines, that could constitute grounds for departure in an unusual case.'" *United States v. Cook,* 938 F.2d 149, 153 (9th Cir. 1991) (quoting U.S.S.G. Ch. 1, Pt. A, § 4(b)). This approach affords the district court a certain degree of flexibility and permits it to act in a more humane and reasonable manner than the Guidelines would otherwise allow.

In its consideration of the three point combination departure, the panel rejects the relatively enlightened view of departures expressed in both the Guidelines and our prior cases. Judge Davies based his three-point departure on a combination of three non-prohibited factors. He considered the fact that the officers would be subject to additional punishment, both professionally and in prison. *Koon,* 833 F. Supp. at 785-86. He then noted that because "neither Koon nor Powell are violent, dangerous, or likely to engage in future criminal conduct," there was an absence of any need to protect the public. *Id.* at 786. Finally, he concluded that "a specter of unfairness" marked the federal trial because it followed an earlier unsuccessful state prosecution of the officers. *Id.* at 790. Judge Davies emphasized that he did not base his departure on any one of the discrete factors individually. Instead, he departed only because of the combined presence of three circumstances which "taken together, justify a reduced sentence." *United States v. Koon,* 833 F. Supp. 769, 786.

In considering the three-point departure, the panel, despite including cursory language in its opinion acknowledging the correct rule, applies a method of review that if adopted generally would essentially eliminate departures based on a combination of factors. What the panel did was to examine each factor individually and conclude that each was not "appropriate" to support a departure. The panel failed to make the proper inquiry: whether the factor was *prohibited* by the Guidelines.

Instead, it created its own category of *inappropriate* factors, namely those which are not prohibited but which in the panel's opinion do not warrant a departure. The fallacy in the panel's approach is that if the individual factors must each be "appropriate," there would be no need to rely on a combination of factors.

The panel's methodology is at odds with our established precedent. The principle underlying our combination departure cases is rooted in the common sense maxim that the whole is greater than the sum of its parts. For that reason, in reviewing combination cases, we have considered the totality of the circumstances and the interplay between or among the various factors, not whether the individual factors in the mix could in themselves constitute a ground for departure. "[I]t will be how the particular pieces fit together, converge, and influence each other that will lead to the correct decisions." *Cook*, 938 F.2d at 153; *see also United States v. Fairless*, 975 F.2d 664, 669 (9th Cir. 1992); *United States v. Floyd*, 945 F.2d 1096 (9th Cir. 1991), *corrected*, 956 F.2d 203 (9th Cir. 1992), *and subsequently superseded*, U.S.S.G. § 5H1.12; *United States v. Takai*, 941 F.2d 738, 743 (9th Cir. 1991).

The panel at no point considered the interplay of the various factors that Judge Davies considered. Instead, it assessed each of the factors independently and concluded in each instance that it would be inconsistent with the Guidelines to depart downward on the basis of that isolated factor—notwithstanding the fact that *none* of them was a *prohibited* factor. The panel then rejected the combination of factors on the basis that each one constituted an inappropriate basis for departure. No combination departure could survive this divide and conquer method of review.

A clear example of the panel's erroneous approach is found in its discussion of the vulnerability to prison abuse issue. The panel rejected Judge Davies' consideration of this factor on the ground that "the number of defendants who might qualify for *this departure* is virtually unlimited...." 34 F.3d 1416, 1455 (emphasis added). The term "this departure" is clearly incorrect. There was *no departure* based on the factor that the panel is

discussing. The departure at issue was based on a combination of factors that included as only one element the potential for prison abuse. The number of persons who would be affected by the combination of factors would *not* be "virtually unlimited." To the contrary, the number would be small indeed. Thus, the panel's statement as to the number "who might qualify" is just plain wrong. It reaches its mistaken conclusion only because it violated *Cook's* clear command and considered one factor in the combination "abstractly and alone." *Cook*, 938 F.2d at 153. Far more important, however, it is this method of analysis that permeates the panel's opinion and leads it, inevitably, to the wrong result.

The panel's discussion of the *kinds* of factors that Judge Davies considered in his three-point departure gives rise to even more serious problems. Some of our cases have held that only factors that relate to the offender's culpability or to the nature of the offense may justify departure. *See, e.g., United States v. Alvarez-Cardenas*, 902 F.2d 734, 737 (9th Cir. 1990). Others have reached precisely the opposite conclusion. *See, e.g., United States* v. *Crippen*, 961 F.2d 882, 885 (9th Cir. 1992). The panel fails to reconcile these irreconcilable positions.

Although the panel's opinion purports to endorse the highly restrictive view set forth in *Alvarez-Cardenas*, in the end it only adds to the chaos in our case law. Following *Alvarez-Cardenas*, the opinion flatly states that "personal and professional consequences" of a conviction "are not appropriate grounds for departing, nor are they appropriately considered as part of a larger complex of factors." 34 F.3d at 1427. However, that statement, while consistent with *Alvarez-Cardenas*, conflicts squarely with *United States v. Mondello*, 927 F.2d 1463, 1469-70 (9th Cir. 1991) (stating that the effect of imprisonment on the offender's family *is* a permissible basis for departure); *see also* § 5H1.6. Perhaps because it recognized the conflict in our cases, or perhaps because it perceived the gross unfairness of its position, the panel substantially undermines the statement by announcing that it does "not intend to imply that factors that do not speak to" the nature of an offense or culpability "are *never* relevant." 34 F.3d at 1427 n.3. (emphasis in original). Such

conflicting pronouncements within the same opinion cannot help district judges who must administer the Guidelines and make sense of our holdings; nor should they stand as the law of this circuit.

Moreover, the panel's statements that the "personal and professional consequences" of a conviction may not be considered constitutes a square rejection of the holding we announced in *United States v. Aguilar*, 994 F.2d 609, 643-45 (9th Cir. 1993) (opinion of O'Scannlain, J.), *op. withdrawn*, 11 F.3d 124 (1993), and *op. replaced on reh'g en banc*, 21 F.3d 1475 (1994). In *Aguilar*, Judge O'Scannlain, in the part of his opinion joined by Judge Hug, explained that district courts have discretion to depart downward from the Guidelines on the basis of the "additional punishment" beyond imprisonment that a conviction may impose. *Id.* at 643.

The panel does not address *Aguilar's* reasoning. While the panel is correct that the original panel opinion in *Aguilar* no longer represents binding precedent, it is surely wrong in concluding that the opinion therefore merits no more than a dismissive half-sentence reference to that fact. 34 F.3d at 1453. The en banc court reheard the case and reversed Aguilar's conviction; accordingly, it did not reach the sentencing question. As a result, the court as a whole never expressed any doubt as to the correctness of Judge O'Scannlain's extensive and perceptive discussion of downward departures. Unlike the panel here, Judge O'Scannlain saw no reason to prohibit sentencing judges from taking into account the practical effects of sentences on the lives of affected individuals. As his opinion made clear, the Guidelines were not intended to treat human beings as impersonal object whose fate was to be determined solely on the basis of statistical surveys.

Judge O'Scannlain's opinion in *Aguilar* was still binding at the time Judge Davies imposed the sentences on Koon and Powell. Accordingly, he acted properly in basing the sentencing

decision on that holding. *Koon*, 833 F. Supp. at 789.[2] At the time of sentencing, our law was clear that "additional punishment" did constitute a proper basis for a downward departure. At a minimum, Judge Davies, as well as other district judges, are entitled to an explanation from the panel as to why we are so abruptly rejecting the *Aguilar* reasoning. So, too, are the defendants who were properly sentenced under the law as it existed at the time of sentencing only to find that on appeal a panel of our court adopted a different view that requires them to be resentenced under a harsher standard.[3] In my opinion, the panel was not justified in peremptorily dismissing a reasoned analysis that bears so directly on the issues in this case and has such drastic consequences for these and other defendants.

II.

The panel's analysis of the five-point departure, like its analysis of the three-point departure, is premised on a highly restrictive and inflexible reading of the Guidelines and a view hostile to the district court's proper role in sentencing. Judge Davies based his five-point downward departure on his finding

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[2] *Aguilar* was not taken en banc until almost a month after Judge Davies filed his opinion.

[3] The fact that Koon and Powell will now be resentenced under a stricter interpretation of the Guidelines than existed at the time of their initial sentencing itself constitute a circumstance to be considered at resentencing. While the change in our case law may not be enough in itself to justify a downward departure, the sentencing judge may want to consider the psychological and emotional effect on the defendants of the change in our law. Both defendants were initially properly sentenced to shorter terms under a rule of law that was valid at the time. There is a certain expectancy that results from such a circumstance. Each defendant now faces a potentially harsher prison term only because the sentencing rules have been changed as the result of the government's appeal. Ironically, the panel's decision may thus have the effect of creating a new "specter of unfairness" which could be considered, consistent with the Guidelines, as one of the factors in a combination justifying departure.

that there was victim misconduct. *Koon*, 833 F. Supp. at 787. The panel accepted this finding; accordingly, our analysis must start from that premise, correct or not. The Guidelines specifically provide for downward departures when victim misconduct "contribute[s] significantly to provoking the offense behavior." § 5K2.10. The panel reversed Judge Davies' departure, holding that, in the context of excessive force cases, an act provokes only if it precipitates an immediate response. 34 F.3d at 1457-1458. Here, again, the panel erred.

The applicable policy statement plainly rejects the requirement of a tight nexus between the provocative behavior and the resulting unlawful conduct. The policy statement specifically instructs a district court to consider "*any other relevant conduct* by the victim that substantially contributed to the danger presented." § 5K2.10(e) (emphasis added). Moreover, it suggests that a departure may be warranted if the unlawful behavior follows an "*extended course* of provocation and harassment." *Id.* (emphasis added).

Having erroneously concluded that provocation encompasses only a very limited range of acts, the opinion surmises that in fact Judge Davies must have based the departure on the volatility of the arrest. The panel then proceeds to explain why volatility *never* constitutes a permissible ground for departure in an excessive force case—although it can point to no guideline language that would support such an absolutist view. 34 F.3d at 1458-1459. In short, the panel's treatment of the five-point departure is dictated less by the language or spirit of the Guidelines than by hostility to Judge Davies' decision to depart.

III.

Our cases adopt two contradictory general approaches to downward departures. One approach emphasizes the importance of the district court's discretion to depart and stresses that the guidelines "were not meant to be a straight jacket for district judges." *Cook*, 938 F.2d at 152; *United States v. Garza-Juarez*, 992 F.2d 896, 911 (9th Cir. 1993). The other takes a narrow

view of the sentencing judge's role and severely limits the circumstances that justify departure. *See, e.g., Alvarez-Cardenas*, 902 F.2d at 737. For reasons that still confound me, in this case the panel casts its lot with the restrictive approach.

In choosing to apply a highly limited view of judicial discretion to the case of Koon and Powell, the panel accomplishes little except to undo a perfectly proper sentence, and to treat the defendants in a harsh and unfair manner. Certainly, the panel does nothing to resolve the underlying conflict in our case law. Only an en banc panel can do that in any event. As of today, our rules remain unclear and district judges are left with little guidance. They will simply have to do their best to determine which of our cases—and which of the contradictory statements in the panel's opinion—are to be followed in particular circumstances.

As a result of our refusal to take this case en banc, all Judge Davies will know with certainty on remand is that in order to depart from the Guidelines, he must point to "a legitimate sentencing concern," 34 F.3d at 1453, & 1457, and must consider factors that are consistent with the "structure and purposes of the Guidelines," 34 F.3d at 1452. The conflicting definitions we have given to these virtually empty phrases will leave Judge Davies without specific guidance when he decides whether to depart downwardly once again. If after reexamining all of the facts and circumstances in this most regrettable case, he again concludes that there are factors present that warrant a downward departure from the Guidelines, he will only be able to do his duty as he himself sees it. I hope that this time any exercise of the discretion he is supposed to possess will be examined with greater understanding and solicitude.

Of course, the Supreme Court may yet provide Judge Davies with the guidance that our own court has refused to offer. I note in this regard that the panel's decision squarely conflicts with the considerably more flexible approach adopted by the First Circuit in a comprehensive opinion authored by then-Chief Judge Breyer, a leading member of the initial Sentencing

Commission. *See United States v. Rivera*, 994 F.2d 942, 952 (1st Cir. 1993).

Rivera holds that the Guidelines do permit departures for personal or professional consequences of conviction that are unusual. *Id.* at 953-56. Moreover, it concludes that apart from a small number of factors "expressly prohibited" (as opposed to "discouraged") by the Guidelines, a district court may depart on the basis of any factor the presence of which is "out of the ordinary" or "unusual." *Id.* at 953. Finally, *Rivera* holds that appellate courts should defer to a district court's determination that a case is "unusual" because such a finding will *"not* involve a 'quintessential legal' interpretation of the words of a guideline, but rather will amount to a judgment about whether the given circumstances, as seen from the district court's unique vantage point, are usual or ordinary, ordinary or not ordinary, and to what extent." *Id.* at 951-52 (emphasis in original). In all three respects, Judge Breyer's approach in *Rivera* is squarely at odds with the inflexible and far stricter approach adopted by the panel in this case.

Given the frequency with which district judges are faced with the type of question that now confronts Judge Davies, and given the conflict within the circuits created by the panel's opinion, perhaps the Supreme Court will deem it important to clarify the extent of the authority that sentencing judges possess to depart downwardly from the Guidelines.

IV.

As a final point, I note that once again, consistent with our long-standing policy, we refuse to disclose to the public important information regarding an official action of this court. Following an en banc vote, we only tell the public whether or not the en banc call carried. We refuse to disclose whether a decision not to go en banc was made by an equally divided court or whether only a single judge wished to reconsider the panel's

decision. We also refuse to disclose how individual judges cast their ballots.[4] By these rules, we immunize our individual actions from public scrutiny. In my opinion, we are wrong to do so. The public has a right to know how all public officials, including judges, conduct the public's business.

I am aware of the arguments in favor of the rule that we have adopted. It is possible that a vote for or against en banc review will be misconstrued by the public as constituting agreement with or opposition to the merits of the opinion in question even though a judge has cast his ballot on entirely different grounds. However, the fact that a public action may be misunderstood is not a reason for suppressing information. Whatever the costs of disclosure may be, I have no doubt the costs of secrecy are greater.

I have addressed the problems of non-disclosure of en banc votes before. Previously, I noted that the public is often deprived of crucial information regarding death penalty cases. *See Brewer v. Lewis*, 997 F.2d 550 (9th Cir. 1993) (Reinhardt, J., dissenting from denial of en banc review); *Harris v. Vasquez*, 949 F.2d 1497, 1539 (9th Cir. 1990). I have also noted that our rule of secrecy is equally indefensible in other cases that involve questions of great public interest. *See Elder v. Holloway*, 984 F.2d 991, 1000 (9th Cir. 1993) (Reinhardt, J., dissenting)

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[4] Under our rules, all active judges are permitted to vote on en banc calls and a call fails unless a majority of the non-recused judges cast affirmative votes. Our rules do not permit judges who wish to record their votes to do so. Instead, judges may inform the public of their votes only through their participation in dissents from denials of suggestions for rehearing en banc. Many judges prefer not to join in published opinions expressing disagreement with procedural actions of this court, even when those actions determine the outcome of important cases. As I have noted before, our rule ensures that the public knows even less about our en banc process than it does about the Supreme Court's decisions with respect to granting certiorari. *See Harris v. Vasquez*, 949 F.2d at 1539 (explaining that Supreme Court Justices are always permitted to make public their votes on petitions for certiorari).

(disagreeing with the rule precluding disclosure of en banc votes in the context of a civil right case).

Indeed, it is usually the most controversial cases—and the ones that are likely to have the widest impact on the public—that are the subject of the most fiercely debated en banc calls. The votes cast in them are clearly of concern to the public. The people have a right to know both how close the decision is on our en banc votes and how each judge voted on particular calls.

Information about the numerical outcome of the votes is necessary in order for the public, the legal community, and the academic world to assess the en banc process itself. For example, it would surely be of interest to those who study the courts if a series of en banc calls failed even though supported by a majority of the judges who actually voted. With such information, court observers could evaluate the soundness of our voting procedures and suggest reforms. There is another reason that readily comes to mind. There are several vacancies on this court. In fact, one seat has been vacant for well over two years. Disclosure of the numerical outcome of our en banc votes would assist the public in determining the practical impact on our operations of the president's inexplicable failure to perform his constitutional duties expeditiously and to better assess the quality of his performance in office. Could one or two votes have made the difference here? The public is entitled to the information that would answer that question.

The public also has a right to know how individual judges voted. Circuit judges have on occasion been appointed to the Supreme Court—even Ninth Circuit judges. The votes on en banc calls constitute a part of a circuit judge's performance of his judicial duties. The votes may provide an indication of how certain judges would perform on the highest court, particularly with respect to the granting of writs of certiorari. In any event, the public has a right to know how each judge who has life tenure has performed all aspects of his judicial functions. Public scrutiny and accountability are the only checks there are on us, other than impeachment.

Finally, the disclosure of the votes of individual judges might reveal whether there are discernible patterns to the outcome of our en banc calls. It could shed light on whether our votes are consistently based on ideological lines and whether there is a pattern in our voting that is related to the party affiliation of the presidents who appointed us. That information would clearly be of interest to students of the judicial system, and, given that so many of our en banc calls involve controversial cases, probably the public and members of the political branches of government as well.

To me, the reasons for disclosure are obvious and irrefutable. I particularly regret that in this case, which is of such public concern, the rules prevent the disclosure of information to which the public is so clearly entitled.

O'SCANNLAIN, Circuit Judge, specially concurring in the dissent, with whom T.G. NELSON and KLEINFELD, Circuit Judges, join:

With the exception of Part IV, I am delighted to concur in Judge Reinhardt's dissent. While desirability of disclosure of en banc voting results is a worthy topic for discussion, I am not convinced this is the appropriate forum.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,	)	CASE NO.
	)	CR 92 686 JGD
	)	
	)	SENTENCING MEMORANDU
Plaintiff,	)	
	)	
v.	)	
	)	
STACEY C. KOON,	)	
LAURENCE M. POWELL,	)	
TIMOTHY E. WIND, and	)	
THEODORE J. BRISENO,	)	
	)	
Defendants.	)	
	)	
	)	

INTRODUCTION

Four Los Angeles Police Officers, Stacey C. Koon, Lawrence M. Powell, Timothy E. Wind, and Theodore J. Briseno were indicted by the United States in a Two-Count Indictment filed August 4, 1992. The Indictment charges in Count One that defendants Laurence F. Powell, Timothy E. Wind, and Theodore J. Briseno violated Title 18, United States Code, Section 2, and Title 18, United States Code, Section 242, and aided and abetted each other. The Government charges that while acting under color of the laws of the state of California, said officers willfully struck with batons, kicked, and stomped Rodney Glen King, resulting in bodily injury to him and, thereby, willfully deprived him of the right preserved and protected by the Constitution of the United States not to be deprived of liberty without due process of law, including the right to be secure in his person and free from the intentional use of unreasonable force by one making an arrest under color of

law. The aiding and abetting count was stated in Count One of the Indictment, but at trial was treated as a separate count and was submitted to the jury as such.

Count Two of the Indictment alleges violation of Title 18, United States Code, Section 242, and is directed against Stacey C. Koon alone. He is charged with willfully permitting the other officers in his presence, and under his supervision, to unlawfully strike with batons, kick, and stomp Rodney Glen King and with the willful failure to prevent the unlawful assault by said officers, all in violation of the right preserved and protected by the Constitution of the United States not to be deprived of liberty without due process of law, including the right to be kept free from harm while in official custody.

The case was tried to a jury commencing February 25, 1993. The jury reached its verdicts on April 16, 1993, and the verdicts were handed up on April 17, 1993.

By said verdicts the jury found that none of the defendants was guilty of aiding and abetting, that Officer Briseno was not guilty of the charges alleged in Count One and was acquitted, that Officer Wind was not guilty of the charges alleged in Count One and was acquitted, that Officer Powell was guilty of the charges other than aiding and abetting alleged in Count One, and that Sergeant Koon was guilty of the charges alleged in Count Two.

The matter is now before this Court for the sentencing of Lawrence M. Powell and Stacey C. Koon. The Court has reviewed, read, and considered the presentence reports, the addenda thereto, the position papers and sentencing memoranda filed by the defendants and by the Government. The Court has reviewed and considered a multitude of letters relating to the trial of the case and sentencing, and letters written in support of

the defendants. The Court has also considered the United States Sentencing Commission *Guidelines Manual*, effective November 1, 1992,[1] and the arguments of counsel. Based thereon, the Court makes its findings as follows and sentences the defendants as follows.

FINDINGS OF FACT

The details of the arrest of Rodney Glen King in the early morning hours of March 3, 1991, on Osborne Street near Hanson Dam, Los Angeles, were disclosed at trial. Multiple motions were made before trial in an effort to resolve the many legal problems that emerged, and witnesses testified and evidence was taken between February 25, 1993, and April 6, 1993. The Government presented its case in great detail. It is hard to imagine that the Government overlooked any fact. However, because the verdicts were general and no special findings were made by the jury, certain factual conclusions and findings remain undetermined. For the purposes of sentencing it falls to the Court to make those findings.[2]

The essential facts proved at trial were as follows:

During the early evening hours of March 2, 1991, Rodney Glen King met with two friends and sat in his wife's Hyundai

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[1] Hereinafter "the Guidelines."

[2] The government argues in its Consolidated Positions and Objections With Respect to Sentencing Factors that there are factual errors in the pre-sentence reports and the Court should make findings pursuant to Federal Rule of Criminal Procedure 32(c)(3)(D), or declare that the facts in dispute are not relied upon by the Court for sentencing. To the extent the disputed facts are consistent with the Court's recitation of the facts herein, the Court finds those to be the facts for sentencing purposes. To the extent there is inconsistency, the Court declares it has not relied upon the inconsistent facts set forth in the pre-sentence reports.

automobile in Altadena, a suburb of Los Angeles, drinking a malt beer beverage, Old English 800, packaged in 40-ounce bottles. Mr. King consumed at least two bottles. His friends also drank Old English 800. Although it is not clear precisely how much they each consumed, it is certain that Mr. King consumed more than 80 ounces. Mr. King and his friends drank in the parked automobile for a number of hours. Late in the evening, they left Altadena in the Hyundai. Mr. King drove. Their intended destination is not clear. Mr. King testified that it was Hanson Dam, but his friend Bryant Allen testified that the three companions left Altadena to "look for women."

Mr. King was intoxicated. He drove the Hyundai from Altadena to the 210 Freeway, then west from Pasadena towards the city of San Fernando. While westbound, in the vicinity of La Tuna Canyon Road, CHP Officer Melanie Singer and Officer Tim Singer, her husband and training officer, observed the Hyundai speeding westbound on the freeway behind the CHP cruiser. Officer Melanie Singer was driving. The CHP vehicle exited and re-entered the freeway at Sunland Boulevard, and with red lights and siren activated followed the Hyundai, which was by then about one mile west of the CHP vehicle. Officer Melanie Singer estimated the speed of the Hyundai west of Wheatland Avenue as being in excess of 100 m.p.h.

Mr. King left the freeway at Paxton Avenue and commenced traveling on surface streets, followed by the Singers' CHP unit. Officer Melanie Singer called for back up. The CHP dispatcher alerted LAPD by radio call. The call was heard by patrol officers of the Los Angeles Unified School District in a unit nearby which joined the chase. In addition, Officers Powell and Wind in an LAPD unit responded to the call. During the pursuit, the CHP officers attempted to communicate with Mr. King as he drove on the surface streets, and ordered him to pull over. He failed to do so. Mr. King testified that he did not pull over because he was afraid of returning to prison.

Mr. King continued on the route chosen by him, at times stopping for red lights, at times proceeding through red lights. The CHP vehicle and the school district vehicle followed the

Hyundai at varying speeds. They were joined by Officer Powell and Wind's vehicle. After the Hyundai left the freeway, the pursuit was always at moderate to slow speeds. The three police vehicles followed the Hyundai for a number of miles on surface streets to the point where it stopped at an entrance to the Hanson Dam recreation area on Osborne Street. In all, the CHP unit followed the Hyundai for approximately eight miles before the pursuit ended.

The CHP vehicle, the School District vehicle, and Officer Powell's vehicle came to rest in the immediate vicinity of the Hyundai. The occupants of the Hyundai were ordered out of the vehicle by Officer Singer. The two passengers exited the Hyundai and followed instructions of the police officers. Mr. King was slow to move from the driver's seat but ultimately did and was repeatedly ordered to lie on the ground. He emerged from the Hyundai smiling. This was the scene when Sergeant Koon arrived. Officers Briseno and Rolando Solano arrived in their unit moments after Sergeant Koon.

Mr. King did what appeared to be a dance step, and then waved at an LAPD helicopter overhead. Officer Melanie Singer ordered Mr. King to move away from the Hyundai and to place his hands where she could see them, and then again ordered him to the ground. When she did so, he grabbed his buttocks. Officer Singer pointed her service revolver at him. Mr. King did not lie prone but moved around on his hands and knees.

Sergeant Koon took command and ordered Officer Melanie Singer to holster her service revolver. The LAPD officers then commenced the arrest process. Mr. King was a large muscular man and a felony suspect. Sergeant Koon testified that he thought Mr. King may have been recently imprisoned because Mr. King appeared to have engaged in the bodybuilding common among prison inmates. The officers ordered Mr. King to lie in the felony-prone position. He refused to do so. Officers Powell, Wind, Briseno, and Solano jointly attempted to place Mr. King in a felony-prone position. He resisted and became combative, forcing the officers to retreat. The subsequent events

were captured by Mr. George Holliday on videotape, Exhibit 20 at trial.

The tape does not capture the entire sequence. It records the events commencing with a view of Mr. King on the ground, surrounded by officers. The Holliday videotape became the focus of a good deal of testimony at trial and was analyzed in thorough detail by expert and other witnesses called by each side. The Court has reviewed the tape for the purpose of sentencing. Although the videotape creates a vivid impression of a violent encounter, careful analysis shows that it is sometimes an ambiguous record of the crucial events. A meaningful understanding of the events it depicts required the explanation of witnesses who are experts in law enforcement. At trial the Government and defendants agreed that much of the officers' conduct was justified and legal, yet vigorously disputed whether and when their behavior became illegal.

The principal question for sentencing not answered by the verdicts is, when did the offenses committed by Officer Powell and by Sergeant Koon occur? The answer to this question determines the extent to which these defendants are liable for Mr. King's injuries. Injury is an element of the offenses with which Officer Powell and Sergeant Koon were charged, and is relevant to the determination of their sentences under the Sentencing Guidelines.

Answering this question requires a two-tiered inquiry. The offenses the jury found to have been committed occurred when Officer Powell used excessive force and formed the intent to deprive Mr. King of his civil rights, and when Sergeant Koon intended to refrain from preventing the officers under his control from using excessive force which deprived Mr. King of his constitutional rights. Sergeant Koon's criminal liability is not derivative from Officer Powell's liability. *See United States v. Reese*, 2 F.3d 870, 889-90 (9th Cir. July 28, 1993). Sergeant Koon's conviction rests entirely upon the wrongfulness of his own conduct, that is, his willful refusal to prevent illegal use of force in his presence. *Id.* Thus, the Court must make separate

determinations concerning Officer Powell's and Sergeant Koon's illegal behavior.

(1) Officer Powell

The videotape displays a continuum of events involving behavior that was initially legal and which became criminal. The initial task for the Court, for the purposes of sentencing, is to determine when Officer Powell's behavior became illegal. Did it become illegal only once and then continue to be illegal for a period of time, or was it at times legal and at times illegal? The Court finds that Officer Powell crossed the line between legal behavior and illegal behavior once. This is demonstrated in Exhibit 20.[3]

Although the videotape is reliable evidence of the physical events that unfolded in the course of Mr. King's arrest, it provides less direct evidence concerning two factors central to Officer Powell's illegal behavior. To determine that at any given point Officer Powell's behavior crossed the line into illegality, the Court must find that Officer Powell used objectively unreasonable force, and that he intended to use excessive force. The standard for objectively unreasonable force is supplied by the Supreme Court in *Graham v. Connor*, 490 U.S. 386, 396, 109 S. Ct. 1865, 1872, 104 L.Ed.2d 443 (1989), which held that "the 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." The *Graham* Court cautioned that "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Id.*

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[3] Exhibit 20 is time calibrated. References are to the calibrations which appear in terms of minutes, seconds, and frames.

Accordingly, in evaluating the videotape, the Court must take into account the totality of the circumstances, including facts not displayed on the tape. Mr. King had not bean searched. Mr. King did not respond to the electrical charge of Sergeant Koon's taser. Sergeant Koon testified that he observed Mr. King sweating profusely. At least during the initial stages of the arrest process, Sergeant Koon may reasonably have suspected that Mr. King was under the influence of PCP because of Mr. King's erratic and recalcitrant behavior.

The initial image on the Holliday videotape is of Mr. King on the ground surrounded by officers. For a brief period, he appears to have been motionless. Mr. King testified that during that moment he decided to try to escape through a gap between the Hyundai and a police vehicle into the Hanson Dam recreation area. He then rapidly rose to his hands and knees, and to his feet. He turned, outstretched his arms forward, and charged towards Officer Powell. Officer Powell took a step and struck Mr. King on the right side of his face and head with the side-handle baton. Mr. King fell to the ground. As Mr. King continued to attempt to rise, he was struck by Officer Powell and then by Officer Wind.

Officer Powell struck Mr. King repeatedly on the lower extremities from the 35th second of the tape to the 51st second of the tape. Officer Powell also delivered a blow to Mr. King's upper torso. Mr. King moved throughout this period, posing an apparent threat. He was ordered to assume the felony-prone position, but failed to respond to these commands. At 55 seconds into the tape, Officer Powell struck Mr. King on the chest or upper abdomen. He rolled over from a position with his abdomen on the ground to a position on his back. Mr. King's right hand moved in a downward direction across his chest and abdomen. Officer Powell struck Mr. King's chest or upper abdomen while Mr. King's hand was moving. After this blow, which may be seen at frame 55:08 on Exhibit 20, the application of force was suspended. The officers observed Mr. King roll over once more onto his abdomen. They watched him for 10 seconds.

In frames 1:03 and 1:04, Officer Powell reached for and briefly handled his cuffs, which were dangling from his right, back trousers pocket. This movement is evidence that Officer Powell perceived Mr. King to be no longer a threat and ready for cuffing.

At 1:05:20, Officer Briseno used his left foot to kick or stomp Mr. King in the upper thoracic area. Mr. King's body writhed in response. His feet rose, his head rose, and he raised his upper torso on his elbows. These movements by Mr. King were reflexive and nonvoluntary. He posed no threat.

Officer Powell struck Mr. King with his baton at 1:07:28 and thereafter struck him another 5 or 6 times.[4] Officer Wind struck Mr. King 4 times with his baton, and kicked him in the upper thoracic or cervical area six times. Mr. King suffered this series of blows until approximately 1:26. At 1:30:13, Officer Powell handed his cuffs to Officer Briseno, and officers surrounded Mr. King. Mr. King was cuffed at 1:42. The procedure continued to 2:05, by which time Mr. King was tied.

As explained below, the Court finds that Officer Powell's offense conduct commenced when he struck King at 1:07:28 on Exhibit 20, and continued to 1:26:00. He crossed the line between legal and illegal behavior at this time. No force used by Officer Powell prior to the blow memorialized on the videotape at 1:07:28 rose to the level of criminal deprivation of Mr. King's rights. Some of it was beyond the standards and practice of the LAPD. However, none of this conduct constitutes a violation of 18 U.S.C. § 242.

To determine the extent to which Mr. King's injuries resulted from Officer Powell's illegal behavior, it is necessary to determine when they occurred and whether they were the

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[4] Because of the quality of the tape, a precise count is not possible.

product of illegal force. These injuries fall into three broad categories: (1) fractures of facial bones and lacerations to the right forehead and facial area, (2) fracture of the distal fibula in the right leg, and (3) body bruises, contusions, and abrasions. The Court's inquiry is whether any of these injuries occurred prior to 1:07:28.

The Facial Fractures and Forehead Laceration. The most contested issue at trial relating to injuries was whether Mr. King's facial fractures and forehead laceration were the result of a baton blow, or blows, by Officer Powell, or the result of his face coming into contact with the ground surface. The Court finds that these facial injuries were caused by Officer Powell and that they occurred in the earliest sequence on the videotape when Mr. King, attempting to escape, charged toward Officer Powell.

Although the videotape is out of focus and the camera is moving too rapidly to record the events with unequivocal clarity, the videotape and other evidence demonstrates that Mr. King rose rapidly to his feet, turned, extended his arms and ran towards Officer Powell, who stepped into Mr. King's path and struck Mr. King with the side-handle baton on the right side of the face and skull. The baton is demonstrated in the tape at this point as being in Officer Powell's hands, vertical, and parallel to Mr. King's upright body.

At trial the government presented evidence that this blow to the head was outside LAPD use-of-force policy guidelines if Officer Powell intended to strike Mr. King's head. However, the Court cannot find that this blow was objectively unreasonable in the totality of circumstances or that Officer Powell acted with an illegal intent. In view of Mr. King's sudden approach and Officer Powell's legitimate interest in stopping the hard-charging Mr. King, Officer Powell may have directed a blow at Mr. King that inadvertently struck his head. Telling evidence that the head blow was unintentional is provided by the fact that Officer Powell never clearly applied force to Mr. King's head again, although he had ample opportunity to do so. Accordingly, Officer Powell is not criminally liable for Mr. King's head and facial injuries.

The Leg Fracture. Mr. King sustained a fracture of the fibula in the right leg. This fracture was in the lower portion of the leg, and the Government argues that it was the result of a blow administered by Officer Powell at approximately 43 seconds into the videotape. The Court agreed it is clear that at that point Officer Powell struck Mr. King with the baton in the area of the right ankle, and that this blow caused Mr. King's fracture.

However, blows to leg joints are within the policy guidelines of the Los Angeles Police Department if necessary to forestall a threat. Preceding the relevant moments the situation had evolved rapidly. Mr. King had tried to rise, and as Officer Powell delivered the blows to the legs, Mr. King continued to move and resist repeated attempts to place him into the felony-prone position. It is unclear that a reasonable officer at the scene would not have delivered at least some of these blows. Moreover, in view of the rapidly shifting nature of the situation, the Court cannot find that Officer Powell intended to use excessive force. Accordingly, although Officer Powell's blow may have been tortious, he is not crimInally liable for the fracture of the fibula.

Body Bruises and Contusions. As described *supra*, at 55 seconds into the tape, Officer Powell struck Mr. King on the chest or upper abdomen as Mr. King's body moved and Mr. King's right hand reached downward across his chest in the direction of the waistline of his pants. At trial Sergeant Mark Conta testified that this was a flagrant violation of the LAPD's use-of-force policy guidelines. However, Mr. King had not been searched, and a reasonable officer at the scene may have judged that Mr. King was reaching for a weapon. Moreover, it is unlikely that Officer Powell intended to use excessive force. The situation forced him to react swiftly to Mr. King's hand movement, and it was not unreasonable for Officer Powell to block the hand movement with his baton. Under the circumstances this blow was not objectively unreasonable. The chest blow did not produce chargeable injury under 18 U.S.C. § 242.

Officer Powell's conduct clearly crossed the line into illegality at 1:07:28 when he struck Mr. King despite his perception that Mr. King was no longer a threat. Officer Powell is liable for the bodily injury he inflicted. He is not liable for bodily injury inflicted by Officer Wind during this period. The precise injuries caused by Powell were not demonstrated at trial. Mr. King undoubtedly sustained contusions as a result of the six blows by Powell. But the nature and extent thereof are unknown. It is impossible to distinguish between the injury inflicted by Wind and that inflicted by Powell. However, the injuries for which Powell is liable are limited to contusions, perhaps abrasions, but no fractures. For the reasons cited above, the Court finds that Officer Powell's behavior did not violate 18 U.S.C. § 242 prior to this moment. Thus, Officer Powell is not criminally liable for injuries sustained before this moment.

(2) Sergeant Koon

The remaining task is to determine when Sergeant Koon's behavior became criminal. The Ninth Circuit has stated that "a police sergeant who stands by and watches while officers under his command use excessive force and refuses to order them to stop may thereby 'subject' the victim to the loss of his or her right to be kept free from harm while in official custody or detention." *See Reese*, 2 F.3d at 889. The police sergeant must recognize that the force is excessive and that there are reasonable steps within his power that he could take to prevent the use of force. *Id*. at 890. Finally, the police sergeant must deliberately or willfully refrain from preventing the excessive force. *Id*.

The court in *Reese* does not squarely address whether the unlawfully excessive force must stem from criminal conduct by officers under the police sergeant's control. Nonetheless, the court's reasoning in *Reese*, as well as authority from other circuits, implies that a police sergeant is liable for permitting harm from excessive force, even when the supervised officers' conduct does not rise to the level of criminal activity, provided that the conduct is a constitutional tort. *See Id*. at 889-90; *O'Neill v.- Krzeminski*, 839 F.2d 9, 11-12 (2d Cir. 1988).

Accordingly, to determine the extent of Sergeant Koon's criminal liability, it is necessary to assess whether he failed to prevent tortious or criminal excessive force applied by Officers Powell, Wind, and Briseno.

Three facts simplify this inquiry. First, Officer Briseno's use of force against Mr. King was limited to a single stomp or kick at 1:05.20. Because Sergeant Koon could not have anticipated Officer Briseno's sudden movement, he is not criminally liable for failing to prevent this kick or stomp.

Second, prior to 1:07.28, Officer Wind delivered several blows to Mr. King in response to Mr. King's attempt to flee and his repeated efforts to rise from the ground. Because Mr. King posed a continuing threat, the Court cannot find that a reasonable officer would not have delivered these blows, or that Sergeant Koon had the requisite criminal intent in permitting them.

Third, the Court has found that prior to 1:07.28, Officer Powell's conduct did not violate 18 U.S.C. § 242.

For these reasons, the Court's inquiry concerning Sergeant Koon is limited to Officer Powell's potentially tortious use of force prior to 1:07.28, and Officers Powell and Wind's use of force after 1:07.28.

The Facial Injuries. Because the Court has found that these injuries were caused by Officer Powell's lawful application of force, Sergeant Koon is not criminally liable for permitting the blow or blows that caused these injuries.

The Leg Fracture. For the reasons discussed *supra*, the Court has found that Officer Powell lacked the requisite criminal intent to use excessive force when he delivered the blow that caused Mr. King's leg fracture. The same reasons compel the Court to find that Sergeant Koon lacked the requisite criminal intent to permit the use of excessive force. Preceding Officer Powell's blows Mr. King had tried to rise, and he continued to resist being placed in the felony-prone position as Officer Powell delivered the blows. Once before, Sergeant Koon had witnessed

Mr. King successfully resist officers, rise up while prone, and charge, intending to escape, in the direction of Officer Powell. Accordingly, Sergeant Koon is not criminally liable for permitting the blow that caused Mr. King's leg fracture.

Body Bruises and Contusions. Because Officer Powell's blow to Mr. King's chest or upper abdomen was a sudden response to Mr. King's hand movement, Sergeant Koon had no reasonable opportunity to anticipate or prevent it, and cannot be charged with injuries stemming from it.

By contrast, Sergeant Koon is liable for permitting Officers Powell and Wind's conduct after 1:07.28. At this point, Officer Powell's conduct crossed the line into criminal illegality. Moreover, because Mr. King posed no threat, Officer Wind's baton blows and leg kicks were objectively unreasonable. Sergeant Koon could have seen that Mr. King's movements in response to Officer Briseno's kick or stomp were involuntary, and he had a reasonable opportunity to halt Officers Powell and Wind's use of force. Sergeant Koon is liable for his failure to order the cuffing of Mr. King during the 10 seconds immediately prior to the kick by Officer Briseno, and for permitting the application of force by Officers Powell and Wind thereafter. Accordingly, bruises and contusions incurred during this period are chargeable to Sergeant Koon.

(3) Summary

Neither Officer Powell nor Sergeant Koon is liable for Mr. King's serious bodily injuries, namely, his facial injuries and leg fracture. Both officers are liable to differing degrees for Mr. King's bruises and abrasions sustained after 1:07:28. Because neither officer violated 18 U.S.C. § 242 prior to this moment, neither is liable for injuries sustained by Mr. King before the event recorded at 1:07.28 of the videotape, and the Court so finds.

DISCUSSION

A. Calculation of Offense Level Under the Sentencing Guidelines

Both defendants Stacey C. Koon and Laurence M. Powell were convicted of violations of 18 U.S.C. § 242. Section 2H1.4 of the Guidelines addresses the calculation of a base offense level for this offense. *See* Guidelines § lBl.2 (applicable Chapter Two guideline determined by the offense of conviction); Guidelines Appendix A.

Pursuant to Guidelines Section 2H1.4, the appropriate base offense level for a violation of 18 U.S.C. § 242 is the greater of (l) 10; or (2) 6 plus the offense level applicable to the underlying offense.[5]

Where the Guidelines specify more than one base base level offense, the Court's determination of which to apply is to be based on the defendant's "relevant conduct," as defined in Section 1B1.3 of the Guidelines. "Relevant conduct" includes:

> all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant . . . .

See Guidelines § lBl.3(l)(A).

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[5] Application Note 1 to Guideline Section 2Hl.4 provides that "6 plus the offense level applicable to any underlying offense" means 6 levels above the offense level for any underlying criminal conduct. Application Note 1 to Section 2Hl.4 refers the Court to the Commentary of another Guidelines section, Section 2H1.1. According to Application Note 1 to Section 2Hl.l, the "underlying offense" includes "any offense under federal state, or local law other than an offense that is itself covered under Chapter Two, Part H, Subpart 1, 2, or 4." *See* Guidelines § 2H1.1, Commentary, Application Note l.

For purposes of calculating Mr. Powell's base offense level, the Court considers his relevant conduct to be the blows he administered after 1:07:28. Mr. Koon, on the other hand, was convicted of an offense of omission, and is liable for failing to stop Powell's and Wind's excessive use of force when he could have and should have. The excessive force used by Powell and Wind with Koon's permission constitutes "relevant conduct" for purposes of calculating Koon's base offense level.[6]

To calculate the defendants' base offense level under Section 2Hl.4, the Court must first determine the appropriate underlying offense and its corresponding offense level. The sum of the corresponding offense level and 6 represents the proper base level offense, if it exceeds l0. *See* Guidelines § 2H1.4, Commentary, Application Note 1.

Based on the defendants' "relevant conduct," the appropriate underlying offense for each is assault. The corresponding offense level, however, depends on whether Powell committed and Koon permitted an aggravated or a minor assault.

1. Aggravated vs. Minor Assault

The government takes the position that the underlying criminal conduct constitutes an aggravated assault, such that the offense levels set forth in Section 2A2.2 apply to both Koon and Powell. The Court agrees.

An aggravated assault, within the meaning of the Guidelines, is a "felonious assault that involved (a) a dangerous weapon with intent to do bodily harm (*i.e.*, not merely to

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[6] The Court recognizes the critical distinction between Koon's offense conduct and the unlawful conduct committed by Powell. *See Reese*, 93 Daily Journal D.A.R. at 9626.

frighten), or (b) serious bodily injury, or (c) an intent to commit the felony."[7] *See* Guidelines § 2A2.2, Commentary, Application Note 1.

In this case, the assault committed by Powell and permitted by Koon is a felony. Pursuant to 18 U.S.C. § 3559, an offense is a Class C felony if the maximum term of imprisonment authorized is at least ten years, but less than twenty years. Ten years is the maximum term of imprisonment authorized for a violation of 18 U.S.C. § 242 when bodily injury results.[8]

Additionally, the felonious assault in this case involved a dangerous weapon. The term "dangerous weapon," as used in the Guidelines, means an "instrument capable of inflicting death or serious bodily injury." *See* Guidelines § 1B1.1, Commentary, Application Note 1(d). Where an object that appears to be a dangerous weapon is "brandished, displayed, or possessed, the object is to be treated as a dangerous weapon for purposes of

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[7] The Application Notes to Section 2H1.1 offer the following example of a case in which the underlying offense is aggravated assault:

> in the case of a conspiracy to interfere with a person's civil rights (a violation of 18 U.S.C. § 241) that involved an aggravated assault (the use of force) to deny certain rights or benefits in furtherance of discrimination (a violation of 18 U.S.C. § 245), the underlying offense in respect to both the violation of 18 U.S.C. § 241 (to which § 2H1.1 applies) and the violation of 18 U.S.C. § 245 (to which § 2H1.3 applies) would be the aggravated assault.

See Guidelines § 2H1.1, Commentary, Application Note 1; *see also* Guidelines § 2H1.4, Commentary, Application Note 1 (referring to discussion of "underlying offense" in § 2H1.1).

[8] In this particular case, the Court instruced the jury that a finding of bodily injury was necessary for conviction. *See* Reporter's Transcript of Proceedings (hereinafter "R.T."), 4/10/93, at 13.

sentencing. *Id.* The side-handle baton which Powell used and Koon permitted to be used against Mr. King is certainly capable of inflicting death or serious bodily injury. On this point, there is consensus among the government, the Probation Officer, the applicable case law, and Mr. Powell's own expert witness. *See* Government's Sentencing Memorandum; Presentence Report, para. 70; *United States v. Park*, 988 F.2d 107, 109-10 (11th Cir. 1993) (metal pipe raised in a threatening manner considered "dangerous weapon" for purposes of aggravated assault Guideline), *petition for cert. filed*, July 13, 1993; R.T., 3/31/93, at 20-23 (testimony of defense biomechanics expert, Dr. Carly Ward, that the side-handle baton can deliver sufficient force to cause loss of consciousness and significant localized damage of facial bones).

Further, the evidence presented at trial and the verdicts clearly demonstrate that defendant Powell used the side-handle baton, and defendant Koon permitted its use, with the intent to harm Mr. King. Guidelines section 2A2.2 distinguishes a situation in which a deadly weapon is used "with intent to do bodily harm," from one in which it is used "merely to frighten." *See* Guidelines § 2A2.2, Commentary, Application Note 1. By itself, Powell's repeated use of the metal side-handle baton to strike Mr. King while King was no longer a threat is evidence that Powell intended to inflict bodily harm on Mr. King. *See Park*, 988 F.2d 107, 109-10 (defendant intended to do bodily harm, and was properly sentenced under aggravated assault guideline, where he swung a metal pipe in the direction of IRS agents, and threatened to "bash their heads" unless they complied with his demands); *See also United States v. Bassil*, 932 F.2d 342, 345 (4th Cir. 1991) (defendant who threw chair toward correctional officers was properly sentenced under aggravated assault guideline). Additionally, as defendant Koon testified at trial, he intended Powell to use the baton as an impact weapon to gain pain compliance, and then to "cripple" King and break [King's] bones." *See* R.T., 3/25/93, at 11 & 54; R.T., 3/24/93, at 19 & 28. Based on this testimony and the evidence of Powell's conduct, the Court is persuaded that Powell used the baton, and Koon permitted its use, with the intent to harm Mr. King, not merely to frighten him.

Because the relevant conduct attributable to both defendants Koon and Powell constitutes a felonious assault involving a dangerous weapon with intent to do bodily harm, the appropriate underlying offense is aggravated assault. Pursuant to Guidelines Section 2A2.2, the base offense level for aggravated assault is 15.

2. Specific Offense Characteristics Under Aggravated Assault Guideline

As set forth in Section 2A2.2, certain specific offense characteristics mandate increases in the aggravated assault base level of 15. *See* Guidelines § 2A2.2(b)(l)-(3). If a dangerous weapon, including a firearm, was "otherwise used," the offense level is increased by 4 levels. *See* Guidelines § 2A2.2(b)(2)(B). If the victim sustained bodily injury, the offense level is increased from 2 to 6 levels, based on the seriousness of the injury. *See* Guidelines § 2A2.2(b)(3). The cumulative adjustments for specific offense characteristics may not exceed 9 levels. *Id.*

In this case, a dangerous weapon, the side-handle baton, was "otherwise used." As discussed above, the side-handle baton constitutes a dangerous weapon within the meaning of the Guidelines. *See* supra; Guidelines § 1B1.1, Commentary, Application Note 1(d).

Although the Guidelines do not specifically define the term "otherwise used," its meaning may be inferred from the context in which it is used. Guidelines Section 2A2.2(b)(2), which catalogues the specific offense characteristics for use of a firearm or other weapon during an aggravated assault, provides:

> (A) If a firearm was discharged, increase by 5 levels; (B) if a dangerous weapon (including a firearm) was otherwise used, increase by 4 levels; (C) if a dangerous weapon (including a firearm) was brandished or its use was threatened, increase by 3 levels.

See Guidelines § 2A2.2(b)(2)(A)-(C). Thus, a dangerous weapon is "otherwise used" where it is used in some manner other than by brandishing it, threatening its use, or discharging a firearm. Here, defendant Powell actually used his side-handle baton to strike Mr. King; he did not merely brandish it or threaten to use it. Because Powell's side-handle baton was "otherwise used," and because Koon permitted such use, the aggravated assault base offense is increased by 4 levels for both defendants Koon and Powell.[9] *See* Guidelines § 2A2.2(b)(2)(B).

The aggravated assault base offense is increased further if Mr. King sustained bodily injury as a result of the aggravated assault. The extent of the increase depends on the severity of the injuries sustained. The Guidelines indicate a 2-level increase for "bodily injury," defined to mean "any significant injury; *e.g.*, an injury that is painful or obvious, or is of a type for which medical attention ordinarily would be sought." *See* Guidelines § lBl.1, Commentary, Application Note 1(b). A 4-level increase is indicated for "serious bodily injury," defined as "injury involving extreme physical pain or the impairment of a function

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[9] Mr. Powell's use of a dangerous weapon was also considered in determining that the Guideline for aggravated assault, rather than minor assault, applies. Nonetheless, the Court must again consider it as a factor for upward adjustment. *See Reese*, 2 F.3d at 894-95 (district court properly applied upward adjustments for use of dangerous weapon and bodily injury, notwithstanding that said factors had already been considered in determining applicability of aggravated assault guideline); *United States* v. *Williams*, 954 F.2d 204, 206-07 (4th Cir. 1992) (reversing district court for refusal to apply upward adjustment under aggravated assault guideline based on "double counting" argument). The Ninth Circuit and other courts have rejected the argument that such calculations constitute improper "double counting." *Reese*, 2 F.3d at 894-95; *see also United States* v. *Newman*, 982 F.2d 665, 672-75 (1st Cir. 1992) (aggravated assault base offense level properly increased for infliction of serious bodily injury, notwithstanding that serious bodily injury was initially considered to determine applicability of aggravated assault guideline), *petition for cert. filed*, April 22, 1993.

of a bodily member, organ, or mental faculty; or requiring medical intervention such as surgery, hospitalization, or physical rehabilitation." *Id.*, Application Note 1(j).

It is certain that Mr. King sustained extensive and "serious" bodily injury at some point during the course of the March 3, 1991 use of force. Substantial evidence was presented at trial that Mr. King suffered numerous facial fractures, contusions and lacerations, and a fracture of the fibula in his right leg, Mr. King's injuries required medical intervention, including numerous sutures to close lacerations of his face and scalp, reconstructive surgery to repair his facial fractures, and a cast to set his fractured leg.

However, in reviewing the continuum of events that were initially legal and later became criminal, the Court has found Mr. Powell's use of force to be lawful until 1:07:28, after Briseno's kick. Mr. Koon's conduct was also lawful until 1:07:28. For purposes of sentencing, the Court considers only those injuries sustained by Mr. King after Koon and Powell crossed the line between legal and illegal conduct at 1:07:28. Because the Court finds that Mr. King's head injuries and facial fractures, as well as the fibula fracture, occurred prior to Briseno's kick at 1:05:20, these serious bodily injuries do not warrant an upward adjustment to the aggravated assault offense level.

In addition to the facial fractures, head injuries, fibula fracture, and some contusions, all of which were lawfully inflicted, Mr. King sustained contusions on his arms, legs, chest, shoulders, and back. It is hard to imagine that the six or more illegal baton blows delivered by Powell between 1 minute 7 and 1 minute 26 on the tape did not cause some of these

contusions.[10] The points at which Powell's illegal blows contacted Mr. King's body, insofar as those points can be determined from the evidence, include the arms, shoulders and back, corresponding to the locations of the contusions. Mr. King's contusions were obvious, as established by the testimonial and photographic evidence at trial. Common experience proves that such extensive bruising is painful and may warrant medical attention. In sum, Mr. King sustained some bodily injury, as that term is used in the Guidelines, as a result of unlawful baton blows inflicted by defendant Powell and permitted by defendant Koon.

Because the Court finds that Mr. King's "serious" bodily injuries were attributable to a lawful use of force, whereas certain bodily injuries of a lesser degree were attributable to Koon's and Powell's unlawful conduct, the Guidelines indicate a 2-level increase in the aggravated assault offense level, rather than the 4-level increase suggested by the government.

The base offense level for aggravated assault is 15 pursuant to Guidelines Section 2A2.2(a). With a 4-level increase for use of a dangerous weapon, the offense level is 19. *See* Guidelines § 2A2.2(b)(2)(B). Because Mr. King sustained bodily injury as a result of Koon's and Powell's illegal conduct, an additional 2-level increase is required. *See* Guidelines § 2A2.2(b)(3)(A). Thus, the offense level applicable to the underlying aggravated assault offense is 21. When the aggravated assault offense level of 21 is added to 6, as required under Section 2H1.4(a)(2), the sum is 27. Since 27 is greater than the base offense level of 10 prescribed at Section 2H1.4(a), the final Chapter Two base offense level is 27. *See* Guidelines §2H1.4(a).

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[10]The kicks and blows delivered by Officer Wind after 1:07:28 may have caused some contusions as well. Mr. Koon permitted and is responsible for these injuries. However, for purposes of determining Koon's offense level, the bodily injury inflicted by Mr. Powell is sufficient to warrant a 2-level increase.

B. Adjustments to the Offense Level

Chapter Three of the Guidelines provides for certain adjustments to the Chapter Two offense level based on the victim's characteristics and the defendant's role in the offense, obstruction of justice, and acceptance of responsibility. None of the Chapter Three adjustments are applicable here.

Mr. King was neither unusually vulnerable nor a government official. *See* Guidelines §§ 3A1.1 - 3A1.2. Mr. King was not physically restrained during the course of the offense. *See* Guidelines § 3A1.3. Therefore, none of the victim-related adjustments apply.

Nor does Mr. Koon's role in the offense warrant an adjustment of the offense level. Mr. Koon did not have an aggravating or mitigating role as defined in the Guidelines. *See* Guidelines §§ 3B1.1-3B1.2. Guidelines Section 3B1.3 requires an upward adjustment where a defendant abuses a position of public trust; however, this enhancement does not apply to civil rights violations under Section 2H1.4, since the base offense level reflects the abuse of authority inherent in the offense. *See* Guidelines § 2H1.4, Commentary, Background.

Pursuant to Guidelines Section 3C1.1 a 2-level increase applies where a defendant "willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense." The Commentary to Section 3C1.1 is explicit that the enhancement applies where a defendant commits perjury. *See* Guidelines § 3C1.1, Commentary, Application Note 3(b).

Mr. Koon testified at trial and denied having acted with the unlawful intent to refrain from protecting Mr. King from an unreasonable use of force. The government contends that the enhancement for obstruction of justice applies here, reasoning that the jury's verdict against Koon necessarily constitutes a finding that Koon testified falsely. The Court disagrees.

A witness testifying under oath commits perjury if he "gives false testimony concerning a material matter with the willful intent to provide false testimony." *See United States* v. *Dunnigan*, ___ U.S. ___, ___, 113 S. Ct. 1111, 1116, 122 L.Ed.2d 445 (1993). A defendant who chooses to testify at trial and makes false statements in his own defense may be subject to an enhancement for obstruction of justice. *See United States* v. *Barbosa*, 906 F.2d 1366, 1369-70 (9th Cir.), *cert. denied*, 498 U.S. 961 111 S. Ct. 394, 112 L.Ed.2d 403 (1990). However, not every accused who testifies at trial and is convicted will incur an enhanced sentence under Section 3C1.1 for committing perjury. *Dunnigan*, ___ U.S. at __, 113 S. Ct. at 1117. An accused may give inaccurate testimony due to confusion, mistake, or memory loss. *Id.* In determining whether to apply Section 3C1.1 to alleged false testimony or statements by a defendant, the testimony or statements are to be "evaluated in a light most favorable to the defendant." *See* Guidelines Section 3C1.1, Commentary, Application Note 1.

Although Mr. Koon's belief that he acted lawfully is mistaken, as indicated by the jury's verdict, the Court finds that Koon's testimony reflects a personal belief which, at the time of trial, he held in earnest. Mr. Koon did not wilfully intend to provide false testimony. That the jury chose to disbelieve Koon's testimony, or found it insufficient to prove lack of intent, does not establish that Koon committed perjury. *Dunnigan*, ___ U.S. at ___, 113 S. Ct. at 1117. An enhancement for obstruction of justice is inappropriate.[11]

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[11] As an alternative or supplementary basis for an obstruction of justice enhancement, the government suggests that Mr. Koon provided false information to the Probation Officer, by offering his book, *Presumed Guilty*, as an accurate version of the underlying facts. The Court is not persuaded by this argument, as Mr. Koon's book merely records his perceptions about the incident of March 3, 1991.

Since Mr. Koon and Mr. Powell were each convicted of a single count, the Chapter Three adjustments for multiple-count indictments are inapplicable. *See* Guidelines §§ 3D1.1 - 3Dl.5.

Finally, neither Mr. Koon no[r] Mr. Powell is entitled to a downward adjustment for acceptance of responsibility under Section 3El.1, since both defendants pled not guilty, put the government to its burden of proof at trial, and were convicted by a jury. *See* Guidelines Section 3El.l, Commentary, Application Note 2.

C. Applicable Guideline Range

The offense level calculations for both defendants Koon and Powell are summarized as follows:

Aggravated Assault Base Offense Level (§ 2A2.2):	+15
Dangerous weapon "otherwise used" (§ 2A2.2(b)(2)(B)):	+ 4
Bodily injury (§ 2A2.2(b)(3)(A)):	+ 2
Violation of l8 U.S.C. § 242 (§ 2Hl.4(a)(2)):	+ 6
TOTAL OFFENSE LEVEL:	27

Neither Koon nor Powell has a criminal record, *see* Koon Presentence Report, para. 94; Powell Presentence Report, para. 74. Both defendants fall within Criminal History Category I. *See* Guidelines, Ch. 5, Pt A.

Under the Guidelines Sentencing Table, an offense level of 27 with Criminal History Category I results in a prescribed range of 70 to 87 months.

D. Downward Departure

The Court must impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth at 18 U.S.C. § 3553(a)(2). Ordinarily, it must select a sentence from within the Guideline range. However, the Sentencing Commission expressly recognized the inherent difficulties in prescribing "a single set of guidelines that encompasses the vast range of human conduct relevant to a sentencing decision." *See* Guidelines, Ch. l, Pt. A, § 4(b). Thus, the Guidelines are intended to carve out a "heartland" of typical cases. *Id.* When presented with an atypical case, to which a particular Guideline linguistically applies, but where the underlying conduct significantly differs from the norm, the Court may consider whether a departure is warranted. *Id.*

Departure from the Guidelines and sentencing outside the prescribed range is unusual. The Commission adopted the departure policy based, in part, on the belief that courts would not invoke it very often. *See* Guidelines, Ch.l, Pt. A, § 4(b). Departure is permissible only where the Court finds "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." *See* 18 U.S.C. § 3553(b); *see also* Guidelines, Ch. l, Pt. A, § 4(b).

A number of specific factors, including race, sex, national origin, creed, religion, and socio-economic status, may never be considered as "aggravating or mitigating circumstances" warranting a departure. *See* Guidelines, Ch. l, Pt. A, § 4(b). With those specific exceptions, however, the Commission did not intend to limit the kinds of factors which may constitute grounds for departure in an atypical case. *Id.*

The present case is atypical in several respects. First, Mr. King's wrongful conduct contributed significantly to provoking the offense behavior. Consequently, though the offense of which defendants Koon and Powell were convicted falls within the language of the Guidelines, Koon's and Powell's underlying

conduct falls outside the range of more typical offenses for which the Guidelines were designed.

Second, defendants Koon and Powell have already sustained, and will continue to incur, punishment in addition to the sentence imposed by this Court. The extraordinary notoriety and national media coverage of this case, coupled with the defendants' status as police officers, make Koon and Powell unusually susceptible to prison abuse. Moreover, Koon and Powell will be subjected to multiple adversarial proceedings and stripped of their positions and tenure by the LAPD.

Third, while the offense of conviction involves a serious assault, there is no evidence, and the government does not argue, that Koon and Powell are dangerous or likely to commit crimes in the future.

Fourth, defendants Koon and Powell were indicted for their respective roles in beating Mr. King only after a state court jury acquitted[12] them of charges based on the same underlying conduct. Under these circumstances, the successive state and federal prosecutions, though legal, raise a specter of unfairness.

Of these four factors, only Mr. King's wrongful conduct independently warrants a sentence reduction. *See* Guideline § 5K2.10. Standing alone, none of the other enumerated factors clearly justifies a departure from the Guidelines. However, the Court's decision whether to depart "require[s] the evaluation of a

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[12]The state of California prosecuted defendant Powell on three counts. He was acquitted on Count I (assault by force likely to produce great bodily injury and with a deadly weapon, Cal. Pen. Code § 245(a)(I)) and Count III (submission of a false police report, Cal. Pen. Code, § 118.1). The jury was divided 8-4 in favor of acquittal on Count II (unnecessarily assaulting or beating any person, Cal. Pen. Code § 149).

complex of factors." *Cook*, 938 F.2d at 151. As the Ninth Circuit observed in *Cook*:

> No single factor may be enough to point to the wise course of decision. But a wise person will not look on each particular factor abstractly and alone. Rather, it will be how the particular pieces fit together, converge, and influence each other that will lead to the correct decision.

See 938 F.2d at 153. The Court finds that the second, third and fourth factors, taken together, justify a reduced sentence.

Each of the first and second factors, as well as the third and fourth factors in combination, constitute "mitigating circumstances," not adequately considered by the Commission in formulating the Guidelines. See Guidelines, Ch. 1, Pt. A, § 4(b); *see also United States v. Cook*, 938 F.2d 149, 151 (9th Cir. 1991). Based on these unique circumstances, a sentence outside the prescribed Guideline range is appropriate for both defendants Koon and Powell.

i. **Mr. King's Wrongful Conduct**

In reducing Mr. Koon's and Mr. Powell's sentence below the prescribed Guidelines range, the Court finds, and considers as a mitigating circumstance, that Mr. King's wrongful conduct contributed significantly to provoking the offense behavior. *See* Guidelines § 5K2.10; *see also United States v. Yellow Earrings*, 891 F.2d 650, 653-54 (8th Cir. 1989) (affirming downward departure from guidelines where victim substantially provoked defendant's assault by pushing her, verbally abusing her, and publicly humiliating her).

The evidence at trial supports a finding that Mr. King engaged in illegal conduct prior to and during his arrest. Mr. King was admittedly intoxicated while driving. He exceeded the speed limit at times. Mr. King failed to stop his vehicle, even after he belatedly perceived the flashing police lights and sirens. Perhaps due to his intoxication, Mr. King was slow to comply

with police orders to exit his car. In any event, he failed to remain prone on the ground as the police ordered him to do. Rather, Mr. King resisted Officers Briseno, Solano, Powell, and Wind. He attempted to escape from police custody. In doing so, Mr. King, a still unsearched felony suspect, ran in the direction of Mr. Powell. He intended to escape into the unlit recreation area. At this point, the officers' use of the baton commenced. The initial provocation for the subsequent course of events was Mr. King's wrongful conduct.

Significantly, defendants Koon and Powell, along with the other LAPD, CHP, and School District officers at the scene of Mr. King's arrest, were present only by happenstance. Had Mr. King pulled over, and not caused the CHP officers to pursue him for up to eight miles, Koon, Powell and the other LAPD officers would not have been summoned. Messrs. Koon and Powell did not seek out a victim; rather, their very presence at the scene was a consequence of Mr. King's wrongful conduct.

At 6'3" and approximately 225 lbs., Mr. King was appreciably larger than both Koon and Powell. Mr. King's reputation for violence was unknown to the officers, but he was a felony suspect. Mr. King resisted and evaded arrest, persistently failed to comply with police commands, and had not been searched for weapons. As such, the defendants' early perception of Mr. King as dangerous was reasonable. This initial perception was reinforced when Mr. King rose from a prone position on the ground and attempted to escape, running toward Mr. Powell. Whether or not Mr. King actually presented a danger to either Powell or Koon, their perception of danger was reasonable. At this point on the videotape, the use of force begins, provoked substantially, if not entirely, by Mr. King.

From the time of that first baton blow until 1:07:28, when the defendants' conduct crossed the line to illegality, Mr. King

persisted in his failure to obey the police. Defendants Koon and Powell repeatedly ordered Mr. King to assume the felony-prone position to avoid further confrontation.[13]

While Mr. King's wrongdoing precipitated the initial, lawful use of force, and thereby substantially contributed to the offense conduct, Mr. King's provocative behavior eventually subsided. The Court recognizes that by the time the defendants' conduct crossed the line to unlawfulness, Mr. King was no longer resisting arrest. He posed no objective threat, and the defendants had no reasonable perception of danger. Nevertheless, the incident would not have escalated to this point, indeed it would not have occurred at all, but for Mr. King's initial misconduct.

Because the defendants were convicted of violation of 18 U.S.C. § 242, Guideline Section 2H4.1 for interference with civil rights under color of law, and Guideline Section 2A2.2 for aggravated assault linguistically apply. However, Mr. King's wrongdoing and the substantial role it played in bringing about the defendants' unlawful conduct remove this case from the "heartland" of offenses contemplated by the aggravated assault Guideline. *See* Guidelines, Ch. 1, Pt. A, § 4(b).

Messrs. Koon and Powell were convicted of conduct which began as a legal use of force against a resistant suspect and subsequently crossed the line to unlawfulness, all in a matter of seconds, during the course of a dynamic arrest situation. However, the convicted offenses fall under the same Guideline Sections that would apply to a jailor, correctional officer, police officer or other state agent who intentionally used a dangerous

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[13] Although this portion of the memorandum is devoted to identification of mitigating circumstances, it includes a discussion of the factors set forth in Guidelines Section 5K2.10(a)-(e). These factors are relevant to the extent of the sentence reduction, and the Court has considered them for that purpose.

weapon to assault an inmate, without legitimate cause to initiate a use of force.

The two situations are clearly different. Police officers are always armed with "dangerous weapons" and may legitimately employ those weapons to administer reasonable force. Where an officer's initial use of force is provoked and lawful, the line between a legal arest and an unlawful deprivation of civil rights within the aggravated assault Guideline is relatively thin. The stringent aggravated assault Guideline, along with its upward adjustments for use of a deadly weapon and bodily injury, contemplates a range of offenses involving deliberate and unprovoked assaultive conduct. The Guidelines do not adequately account for the differences between such "heartland" offenses and the case at hand.

The criminal conduct of a state officer who launches an unprovoked assault on an individual in custody is dissimilar to the conduct of defendants Koon and Powell who, at least initially, were incited to use force. Consistent with the policy of the Guidelines, the sentence imposed must reflect this disparity. *See* Guidelines Ch. 1, Pt. A, § 3 (Guidelines seek reasonable uniformity in sentencing for similar criminal offenses committed by similar offenders); *see also* 18 U.S.C. § 3553(a)(6) (courts should avoid unwarranted sentence disparities among defendants with similar records who are guilty of similar conduct).

ii. Additional Punishment

A legitimate mitigating circumstance arises where a defendant is subject to punishment in addition to the court-imposed sentence. *See United States v. Aguilar*, 994 F.2d 609, 664 (1993). The courts have recognized two categories of "additional punishment" as valid bases for downward departure: (1) the defendant's extreme vulnerability to prison abuse; and (2) the defendant's exposure to additional adversarial proceedings as a result of his conviction. Both categories are applicable to each defendant Koon and Powell.

(a). Extreme Vulnerability to Abuse in Prison

Where the severity of any imposed sentence is increased due to the defendant's "extreme vulnerability" to prison abuse, a downward departure may be considered. *See United States v. Gonzales*, 945 F.2d 525, 526 (2d Cir. 1991); *United States v. Lara*, 905 F.2d 599 (2d Cir. 1990).

Lara involved a prisoner with an immature and fragile appearance and a bisexual orientation, who had been threatened during his presentence incarceration. Prison officials determined that the only way to protect Lara was to place him in solitary confinement. The district court found this extraordinary circumstance increased the severity of Lara's prison term and warranted a downward departure, and the Court of Appeals affirmed. *See Lara*, 905 F.2d at 605.

In *Gonzalez*, the defendant was likewise "extremely small and feminine looking." 945 F.2d at 526. Unlike the defendant in *Lara*, though, Gonzalez was not homosexual or bisexual, nor had he been victimized or threatened prior to sentencing. There was no indication that Gonzalez would be kept in solitary confinement. Notwithstanding, the district court concluded that a downward departure was appropriate to ensure Gonzalez's safety, and the Second Circuit affirmed. *See Gonzalez*, 945 F.2d at 526-27.

Obviously, the facts of the present case are significantly different. From a purely physical standpoint, defendants Koon and Powell are not unusually vulnerable to prison abuse. However, the widespread publicity and emotional outrage which have surrounded this case from the outset, in addition to the defendants' status as police officers, lead the Court to find that Koon and Powell are particularly likely to be targets of abuse during their incarceration. While the Commission did consider the vulnerability of prisoners to physical assault in formulating the Guidelines, *see Lara*, 905 F.2d at 603, the circumstances of this case are extraordinary and were not adequately contemplated. *See* 18 U.S.C. § 3553(b); Guidelines § 5K2.0 (courts may depart based on a factor considered in the

Guidelines where, dub to unusual circumstances, the factor is present to a degree not contemplated by the Guidelines).

The Court would certainly hesitate to grant a departure based solely on Koon's and Powell's vulnerability to abuse. The few cases that support "extreme vulnerability" as a factor for departure are limited to consideration of a defendant's physical characteristics, and are therefore distinguishable. Moreover, while the Second Circuit has expressly upheld a prisoner's extreme vulnerability as a proper ground for departure, the Ninth Circuit has not ruled on the issue. ***But see Aguilar***, 994 F.2d at 644 (citing with approval the Second Circuit's holding in *Lara*, 905 F.2d at 601-03, for the proposition that additional punishment is a valid mitigating factor). Finally, as the government notes, many police officers are now, and have been, safely incarcerated in the federal prison system. *See* Government's Consolidated Positions and Objections, at p. 14 & Ex. G.

However, the Court considers the defendants' vulnerability to prison abuse, not by itself, but in combination with other factors, including another source of additional punishment recognized by the Ninth Circuit: multiple adversarial proceedings. *Cook*, 938 F.2d at 151. As such, the unusual likelihood that Koon and Powell will be fearful of or actually subjected to physical harm while incarcerated, and the resultant increased severity of any sentence imposed, are legitimate factors in the Court's decision to depart downward.

(b). Additional Adversarial Proceedings

In *Aguilar*, the Ninth Circuit recognized that defendants may incur "additional punishment" warranting a downward departure where, as a result of their conviction, they are subjected to further public, quasi-judicial proceedings and the

burdensome consequences that flow therefrom.[14] *See Aguilar*, 994 F.2d at 644 (affirming district court's downward departure on ground that convicted federal judge would be subject to a long course of adversarial proceedings and resultant humiliation and economic burden).

Defendants Koon and Powell will be subjected to a multiplicity of adversarial proceedings. The LAPD Board of Rights will charge Koon and Powell with a felony conviction[15] and, in a quasi-judicial proceeding, will strip them of their positions and tenure.[16] Koon and Powell will be disqualified from other law enforcement careers. In combination, the

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[14] The Ninth Circuit considered the additional disbarment and impeachment proceedings that Judge Aquilar would endure not as an independent basis for departure, but in combination with the unique burdens that those proceedings imposed. *Aguilar*, 994 F.2d at 644 (citing Cook, 938 F.2d 149, 153 (9th Cir. 1992)). This Court likewise considers a combination of factors in determining that Koon and Powell face "additional punishment." Those factors include the other adversarial proceedings to which Koon and Powell will be subjected and the associated burdens, together with the defendants' vulnerability to prison abuse.

[15] At the sentencing hearing, defense counsel represented that both Koon and Powell also face Board of Rights proceedings on charges of their misconduct on March 3, 1991.

[16] As defense counsel observes, Koon and Powell have already endured multiple adversarial proceedings, as they were prosecuted twice, in successive state and federal trials, for the same underlying conduct. The burden these successive trials imposed on Koon and Powell, while undoubtedly substantial, did not flow from their criminal convictions, and is therefore not the sort of "additional punishment" contemplated in *Aguilar*.

additional proceedings, the loss of employment[17] and tenure, prospective disqualification from the field of law enforcement, and the anguish and disgrace these deprivations entail, will constitute substantial punishment in addition to any court-imposed sentence. In short, because Koon and Powell are police officers, certain unique burdens flow from their convictions.[18]

Additional punishment will be visited upon defendants Koon and Powell as a result of their vulnerability to prison abuse and the adversarial proceedings and related consequences they will suffer as police officers. Such additional punishment constitutes a mitigating circumstance not adequately considered by the Guidelines.

iii. Absence of Need to Protect the Public

In determining the sentence to be imposed, the Court must consider both the need to reflect the seriousness of the offense, and the need to afford adequate deterrence to criminal conduct. *See* 18 U.S.C. § 3553. In this case, defendants Koon and Powell abused their positions of public trust. The offenses of

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[17] The plurality and the dissent in *Aguilar* apparently agree that loss of position, by itself, would not justify a departure. *See* 994 F.2d at 624-25 & 645.

[18] The specific factors warranting departure in *Aguilar* were, of course, peculiar to Judge Aguilar's circumstance. The Ninth Circuit considered the additional punishment Judge Aguilar would suffer because he is a federal judge, i.e., disbarment and impeachment hearings, removal from a life-tenured position, disqualification from future government appointive positions, and potential forfeiture of his pension rights. *See Aguilar*, 994 F.2d at 644. Presumably, the Ninth Circuit did not intend to create a downward departure available exclusively to convicted Article III judges. The factors considered in the present case, while not identical to those warranting departure in *Aguilar*, are certainly analogous.

which they were convicted are serious,[19] and the Guidelines emphasize the "compelling public interest in deterring and adequately punishing" such conduct. *See* Guidelines § 2H1.4 Commentary, Background.

However, the sentence imposed must also take into account the need to protect the public from further criminal activity by defendants Koon and Powell. *See* 18 U.S.C. § 3553(a)(2)(C). The Court finds, and the government does not dispute, that neither Koon nor Powell are violent, dangerous, or likely to engage in future criminal conduct. There is no reason to impose a sentence that reflects a need to protect the public from these defendants.

Given the seriousness of the offense conduct here, the absence of a potential for recidivism does not, by itself, warrant a departure.[20] However, in attempting to fashion a fair and appropriate sentence for Koon and Powell, the Court has considered, among other factors, that their incarceration is not necessary to protect the public.

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[19] Indeed, the Guidelines are explicit that "persons who abuse their positions of trust . . . are generally viewed as more culpable." *See* Guidelines § 3B1.3 Commentary, Background.

[20] Additionally, the Guidelines take into account the need for public protection, at least to some extent, by factoring a defendant's criminal history into the determination of an appropriate sentence range. *See* Guidelines, Ch. 5, Pt. A. However, Koon and Powell fall into the lowest criminal history category, along with first-time offenders who may manifest a violent nature or a potential for recidivism. Within Criminal History Category I, the Guidelines do not adequately distinguish defendants who, for a variety of reasons, are particularly unlikely to commit crimes in the future. Here, the need to protect the public from the defendants' future criminal conduct is absent "to a degree" not contemplated by the Guidelines. *See* 18 U.S.C. § 1335(b); Guidelines § 5K2.0.

iv. Successive State and Federal Prosecutions

In the California state court case, *People v. Powell, et al.*, Messrs. Koon and Powell were tried by a jury and acquitted[21] of criminal charges for their respective roles in the March 3, 1991 beating of Mr. King. The same underlying conduct gives rise to the convictions on which the Court must now sentence Koon and Powell. As the Court has repeatedly stated, both in its pretrial orders and on the record at trial, the federal prosecution of Messrs. Koon, Powell, Wind and Briseno did not place those defendants in double jeopardy. Under the doctrine of "dual sovereignty," the state and federal governments are free to prosecute violations of their respective laws. *See Heath v. Alabama*, 474 U.S. 82, 106 S. Ct. 433, 88 L.Ed.2d 387 (1985). Successive state and federal prosecutions for the same act do not violate the Fifth Amendment.

Nevertheless, a federal conviction following a state acquittal based on the same underlying conduct does create an unusual circumstance, and significantly burdens the defendants. The state of California vigorously prosecuted Koon and Powell, and lost. Many disagreed with the outcome, but there has been no showing that a clear miscarriage of justice occurred. While the federal government has certainly not transgressed the defendants' constitutional rights, its indictment of Koon and Powell after verdicts of acquittal by a state court jury raises a specter of unfairness.

In sum, the Court finds that the combined extraordinary circumstances of this case give rise to "mitigating circumstances" that warrant a departure from the Guidelines range. In reaching this conclusion, the Court is mindful that, by creating the Sentencing Commission and adopting the Guidelines, Congress

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[21] As noted earlier, Powell was acquitted on two of three Counts. The jury was divided as to Count II against Powell.

sought to achieve uniformity in sentencing and intended that departures would be rare. On the other hand, it was not Congress' aim to straitjacket the sentencing court. *See Lara*, 905 F.2d at 604. The legislative history is explicit on this point, stating that:

> [t]he Committee does not intend that the guidelines be imposed in a mechanistic fashion. It believes that the sentencing judge has an obligation to consider all the relevant factors in a case and to impose a sentence outside the guidelines in an appropriate case. The purpose of the sentencing guidelines is to provide a structure for evaluating the fairness and appropriateness of the sentence for an individual offender, not to eliminate the thoughtful imposition of individualized sentences.

See Lara, 905 F.2d at 604 (citing S. Rep. No. 225, 98th Cong., 2d Sess. 52, reprinted in 1984 U.S. Code Cong. & Admin. News 3182, 3235 (Legislative History)).

The Court's decision to depart from the Guidelines in this case is the result of a considered effort to assess the unusual circumstances of the underlying conduct, with the aim of fashioning fair and appropriate sentences for Mr. Koon and Mr. Powell as individuals.

v. Extent of the Departure

The Court finds that the convergence of extraordinary factors in this case warrants a downward departure of 8 levels, resulting in a final offense level of 19. The downward departure is appropriate for each defendant, Koon and Powell.

The Court does not have limitless discretion in determining an appropriate departure, but is guided by the judgments of Congress and the Sentencing Commission. *United States v. Lira-Barraza*, 941 F.2d 745, 748 (9th Cir. 1991). Where it finds a departure from the prescribed Guidelines range is warranted, the Court must provide a reasoned, detailed explanation of the extent of its departure. *See* 18 U.S.C.

§ 3553(c)(2); *Lira-Barraza*, 941 F.2d at 748. The explanation must be "founded on the structure, standards and policies of the Act and Guidelines." *Id.* at 751.

In determining the sentence to be imposed, the Court must not create unwarranted disparities among defendants with similar records who are guilty of similar conduct. *See* 18 U.S.C. § 1335(a)(6). Defendants Koon and Powell are sentenced under the Guideline sections applicable to all government officers who abuse their positions of trust by assaulting, or permitting to be assaulted, an individual in official custody, in violation of that individuals' constitutional rights. The conduct of Koon and Powell is dissimilar to the conduct of others who might be sentenced under the same Guideline sections, in that King's wrongful conduct substantially contributed to provoking the offense behavior. Based on this distinction, expressly recognized by the Guidelines as a proper basis for departure, the Court reduces the defendants' total offense level by 5 points.

In determining that a 5-level reduction is appropriate, the Court has relied on the factors set forth at Guidelines Section 5K2.10,[22] the overall standards and policies of the Guidelines, and its own discretion in attempting to fashion a fair sentence. The policy of the Guidelines expressly contemplates a downward departure where a victim's wrongful conduct removes the offense from the heartland of typical cases, *see* Guidelines Ch. 1, Pt. A, § 4(b) and § 5K2.10, but the appropriate extent of departure is left to the Court's discretion, *see* Guidelines § 5K2.0 and Ch. 1, Pt. A, § 4(b) (departures based on the factors listed in Chapter 5, Part K remain unguided). Nevertheless, *Lira-Barraza* instructs the Court to consider the structure, as well as the policy of the Guidelines, in deciding how far to depart. 941 F.2d at 751.

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[22] The relevant § 5K2.10 factors and their application to this case are discussed earlier, in explaining the grounds for departure.

As a preliminary matter, the Court observes that *Lira-Barraza* and its progeny place the district courts in an untenable position, by requiring on one hand that a departure be based on factors not adequately considered by the Guidelines, and on the other hand that the Court find some analogy in the Guidelines to justify the extent of departure. In any event, the Court has attempted to follow *Lira-Barraza's* directive, and has reviewed the Guidelines for an analogy which might offer some guidance.

No helpful analogy was found, since no Guideline section provides a downward adjustment based on a victim's wrongful conduct that contributes to the offense, or any similar factor. In fact, very few Guideline sections provide for downward adjustments at all. Rather, the Guidelines generally specify floor offense levels, which are adjusted upward based on specific offense characteristics. Given the wide range of factors requiring upward adjustments, the extent of an upward departure may be more readily explained by analogy to the Guidelines. The few Guidelines sections that set forth specific grounds for downward adjustment are inapposite to this case.[23]

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[23] For example, the Guidelines provide a downward adjustment for certain crimes if the offense was committed other than for profit. *See, e.g.*, Guidelines Section § 2L2.3 (Trafficking in a United States Passport); § 2L1.1 (Smuggling and Transporting, or Harboring an Unlawful Alien). Similarly, under the guideline applicable to transportation for the purpose of prostitution, the Commission recommends an 8-level downward departure if the offense was not committed for profit and did not involve physical force or coercion. *Id.* § 2G1.1, Commentary, Application Note 1. Under the guideline for threatening communications, a 4-level downward adjustment applies where the defendant's conduct involved a specific instance evidencing little or no deliberation. A defendant who is an accessory after the fact is assigned an offense level 6 points lower than the underlying offense level. *Id.* § 2X3.1(a). None of these Guideline Sections or grounds for downward adjustment is analogous to the present case.

Based on a convergence of three additional factors, the Court finds another mitigating circumstance which warrants a 3-level departure. The first factor in the convergence is the "additional punishment" to which defendants Koon and Powell will be subjected. The clear policy of the Guidelines is that similar defendants convicted of similar offenses should receive like sentences. Because the additional punishment resulting from the defendants' vulnerability to prison abuse, exposure to multiple adversarial proceedings, and status as police officers will increase the severity of any sentence imposed, the Court may reduce the sentence to account for these factors without creating an unwarranted disparity.

The absence of a need to protect the public from these defendants, together with the unusual circumstance of their indictment after the state court verdicts are the second and third factors in the convergence. These factors distinguish Koon and Powell from other defendants who might be convicted of similar conduct. Their sentence should reflect the distinction. In its discretion, the Court finds this complex of three factors justifies a 3-level departure.[24]

Thus, the final offense level for each defendant after downward departure is 19. An offense level of 19 with a Criminal History Category I results in a prescribed Guideline

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[24] As before, the Court is unable to articulate an analogy to the "structure" of the Guidelines, and has instead relied on the policies expressed therein. The Commission intended that a departure based on "additional punishment" or any other factor not mentioned in the Guidelines would remain unguided and left to the courts' discretion. *See* Guidelines Ch. 1, Pt. A, § 4(b). The requirement that departures be guided by analogy to other guidelines provisions seeks to ensure that the objectives of uniformity and proportionality are served. *See United States* v. *Streit*, 962 F.2d 894, 902 (1992). The Court has been mindful of those objectives in determining the extent of departure.

sentencing range of 30 to 37 months. *See* Guidelines, Ch. 5, Pt. A.

E. Appropriate Sentence Within Guideline Range

Having departed downward to offense level 19, the Court sentences defendants Koon and Powell at the low end of the prescribed Guideline range to a term of 30 months. In reaching this decision, the Court has considered the Pre-Sentence Reports and numerous letters written on behalf of both defendants Koon and Powell. Based on their strong family and community ties and distinguished records of public service, the Court sentences each defendants at the low end of the prescribed Guidelines range to a term of 30 months.

F. Supervised Release

Pursuant to Guidelines Section 5D1.1, the Court must order a term of supervised release when a sentence of imprisonment of more than one year is imposed, or when required by statute. *See* Guidelines § 5D1.1(a).

Defendants Koon and Powell were convicted of violation of 18 U.S.C. § 242 resulting in bodily injury, a Class C felony. *See* 118 U.S.C. § 3559. Since Section 242 does not specifically require a term of supervised release, the length of the term is governed by Guidelines Section 5D1.2(b). Conviction of a Class C felony results in a supervised release term of at least two years but not more than three years. *See* Guidelines § 5D1.2(b)(2).

The Probation Officer recommends a term of two years. Also, the Court has considered the factors set forth at 18 U.S.C. §§ 3553(a) & 3583(c), and finds that two years supervised release is reasonable and appropriate for both defendants Koon and Powell.

G. Restitution, Fines, and Costs of Confinement

i. Restitution

The Court, when sentencing a defendant convicted of an offense under Title 18, may order in addition to any other penalty authorized by law that the defendant make restitution to any victim of the offense. 18 U.S.C. § 3663(a)(1). If a defendant is sentenced to a term of supervised release, then any restitution ordered shall be a condition of such supervised release. 18 U.S.C. § 3663(g).

In determining whether to impose an order of restitution, the Court must consider the amount of loss sustained by the victim as a result of the offense, the financial resources of the defendant, the financial needs and earning ability of the defendant and his dependents, and such other factors as it deems appropriate. 18 U.S.C. § 3664(a). The Court's authority to deny restitution is limited. *See* Guidelines § 5E1.1, Commentary. If the Court does not order restitution, it must state its reason for doing so. 18 U.S.C. § 3553(c); *see also* Guidelines § 5E1.1, Commentary.

Restitution is claimed in the amount of $189,494.31 for both Mr. Koon and Mr. Powell. *See* Koon Pre-Sentence Report, para. 114; Powell Pre-Sentence Report, para. 134. Said claim is unsubstantiated and is best left for the pending civil action. Moreover, neither defendant is able, or is likely to become able to pay restitution. *See* Koon Pre-Sentence Report, paras. 119-22, 132; Powell Pre-Sentence Report, paras. 100-02, 112. An order to pay restitution would place an undue burden on Mr. Koon's dependents. For these reasons, restitution will not be ordered.

ii. Fines

Under the Guidelines, the Court is required to impose a fine in all cases, except where the defendant establishes that he is unable to pay and is unlikely to become able to pay any fine. *See* Guidelines § 5E1.2. The Fine Table at Guidelines Section

5E1.2(c)(3) indicates the range of sanctions corresponding to the defendant's offense level. In addition to the fine imposed pursuant to Section 5E1.2(c), the Court must impose an additional fine at least sufficient to pay the costs to the government of any imprisonment, probation, or supervised release ordered. *See* Guidelines § 5E1.2(i).

However, the Court may impose a lesser fine or waive all fines, including costs of confinement, where the defendant establishes (i) that he is not able to pay and, even with the use of a reasonable installment schedule, is not likely to become able to pay all or part of the fine; or (ii) that imposition of a fine would unduly burden the defendant's dependents. *See* Guidelines § 5E1.2(f) & (i).

The Pre-Sentence Report indicates that Koon's assets are essentially exhausted. He has five dependent children who will be unduly burdened if a fine is imposed. Powell is likewise unable to pay a fine, and unlikely to become able to pay. Accordingly, all fines are waived, including the cost of imprisonment and supervision.

iii. Victims of Crime Act of 1984

Pursuant to the Victims of Crime Act of 1984, the Court must impose a special assessment of $50 on any individual convicted of a felony against the United States. *See* Guidelines § 5E1.3. The Act does not authorize the court to waive imposition of the assessment. *See* Guidelines § 5E1.3, Commentary. Each defendant is therefore ordered to pay a $50 special assessment.

The Clerk is ordered to prepare judgment and commitment orders consistent with the Court's findings and orders expressed herein, and with such other orders the Court may articulate during the sentencing hearing.

IT IS SO ORDERED.

Dated: August 4, 1993

/s/ John G. Davies
JOHN G. DAVIES
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,	)	CASE NO.
	)	CR 92 686 JGD
Plaintiff,	)	ORDER DENYING
	)	DEFENDANTS'
v.	)	MOTIONS FOR
	)	JUDGMENT OF
STACEY C. KOON,	)	ACQUITTAL AND
LAURENCE M. POWELL,	)	NEW TRIAL
TIMOTHY E. WIND, and	)	
THEODORE J. BRISENO,	)	
	)	
Defendants.	)	
	)	
	)	

On May 6, 1993, defendant Stacey C. Koon filed a Motion for Judgment of Acquittal Notwithstanding the Verdict Pursuant to Federal Rule 29(c) or in the Alternative a Motion for New Trial Pursuant to Federal Rule of Criminal Procedure 33. The same day, defendant Laurence M. Powell filed his Motion for New Trial and Request for Hearing Thereon. On May 28, 1993, Mr. Koon joined in Mr. Powell's motion for new trial. On June 24, 1993, the government filed its Response to Defendant Koon's and Defendant Powell's Motions for Judgment of Acquittal and New Trial, along with a separate Consolidated Response in Opposition to Defendant Koon's and Defendant Powell's Motion for New Trial Based on Kastigar Issues. On July 14, 1993,[1] Mr. Powell filed his Reply to Government's

[1] On May 13, 1993, the Court ordered the government to respond to the new trial motions on or before June 14, 1993. The defendants were ordered to reply to those responses, if at all, by July 5, 1993.

Opposition to Defendant Powell's Motion for New Trial. On August 4, 1993, the defendants' motions for new trial came before the Court for argument.

The Court has reviewed and considered the parties' papers and the oral arguments of counsel. Based on this review, the Court HEREBY DENIES Mr. Koon's motion for judgment of acquittal or in the alternative for new trial, and DENIES Mr. Powell's motion for new trial.[2]

FACTS

On August 4, 1992, four Los Angeles Police Officers, Stacey C. Koon, Laurence M. Powell, Timothy E. Wind, and Theodore J. Briseno, were indicted by the United States in a Two-Count Indictment. The Indictment charges in Count One that defendants Laurence M. Powell, Timothy E. Wind, and Theodore J. Briseno violated Title 18, United States Code, Section 2, and Title 18, United States Code, Section 242, and aided and abetted each other. The Government charges that while acting under color of the laws of the state of California, said officers willfully struck with batons, kicked, and stomped Rodney Glen King, resulting in bodily injury to him and, thereby, willfully deprived him of the right preserved and protected by the Constitution of the United States not to be deprived of liberty without due process of law, including the right to be secure in his person and free from the intentional use of unreasonable force by one making an arrest under color of law. The aiding and abetting count was stated in Count One of the Indictment, but at trial was treated as a separate count and was submitted to the jury as such.

Count Two of the Indictment alleges violation of Title 18, United States Code, Section 242, and is directed against Stacey

[2]The government argues that Mr. Koon's Joinder in Defendant Powell's Motion for New Trial is ineffective since it was untimely filed after May 6, 1993. In any event, the reasons set forth herein for denying Mr. Powell's new trial motion would defeat that motion with respect to Mr. Koon as well.

C. Koon alone. He is charged with willfully permitting the other officers in his presence, and under his supervision, to unlawfully strike with batons, kick, and stomp Rodney Glen King and with the willful failure to prevent the unlawful assault by said officers, all in violation of the right preserved and protected by the Constitution of the United States not to be deprived of liberty without due process of law, including the right to be kept free from harm while in official custody.

The case was tried to a jury commencing February 25, 1993. The jury reached its verdicts on April 16, 1993, and the verdicts were handed up on April 17, 1993.

By said verdicts the jury found that none of the defendants was guilty of aiding and abetting, that Officer Briseno was not guilty of the charges alleged in Count One and was acquitted, that Officer Wind was not guilty of the charges alleged in Count One and was acquitted, that Officer Powell was guilty of the charges other than aiding and abetting alleged in Count One, and that Sergeant Koon was guilty of the charges alleged in Count Two.

On April 27, 1992, the Court granted defendants Koon and Powell's request for an extension of time to file Rule 33 motions for new trial, and ordered that such motions be filed on or before May 7, 1993.

DISCUSSION

Mr. Koon seeks a judgment of acquittal pursuant to Fed. R. Crim. Pro. Rule 29(c), arguing that the evidence at trial was insufficient to sustain a verdict of guilt. Alternatively, Mr. Koon request[s] a new trial pursuant to Fed. Crim. Pro. Rule 33 on the grounds that: (l) the evidence at trial was insufficient to establish the intent element of the charged offense; (2) the Court improperly restricted the scope of expert testimony; (3) the Court failed to properly instruct the jury on Fourteenth Amendment issues; (4) the Court erroneously admitted into evidence Mr. Briseno's state court testimony, in violation of Mr. Koon's Fifth Amendment rights pursuant to *Kastigar v. United*

States, 406 U.S 441 (1972); and (5) the government offered and relied on Mr. Briseno's state court testimony despite a belief that said testimony was perjurious, in violation of Mr. Koon's due process rights.

Mr. Powell seeks a new trial on the grounds that: (l) the government's introduction of Mr. Briseno's state court testimony was improper under the *Kastigar* doctrine; (2) the Court improperly permitted the government to introduce Mr. Briseno's unimpeached state court testimony after the government stated in writing that said testimony was perjured or false; (3) Mr. Powell was denied his Sixth Amendment confrontation right, as he did not have the same "meaningful" opportunity to cross-examine Mr. Briseno at the state court trial that he would have enjoyed had Briseno testified in this Court; (4) Mr. Briseno's state court testimony was improperly introduced as rebuttal evidence as to Mr. Powell; and (5) the government's closing argument to the jury was improper and effectively eliminated from the jury's consideration an element of the charged offense.

The arguments raised by Messrs. Koon and Powell overlap to some extent. The Court responds to each issue raised by the defendants, addressing Koon's and Powell's motions together where appropriate.

* * * *

C. Mr. Koon's Motion for New Trial Based On Improper Jury Instructions

Mr. Koon seeks a new trial on the theory that the Court failed to instruct the jury pursuant to the standard enunciated in *Johnson v. Glick*, 481 F.2d 1028 (2d Cir.), *cert. denied*, 414 U.S. 1033 (1973). Because he was indicted under the Fourteenth Amendment and was specifically excluded from the Fourth Amendment violation charge, Mr. Koon contends that the Court erroneously instructed the jury under Fourth Amendment standards.

In a recent ruling, the Ninth Circuit clearly reiterated that "'*all* claims that law enforcement officers have used excessive force . . . in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment . . . .'" *United States v. Reece et al.*, 93 Daily Journal D.A.R. 9617, 9622 (9th Cir., July 28, 1993) (quoting *Graham v. Connor*, 490 U.S. 386, 395 (1989)). By so holding, the Ninth Circuit "expressly disapproved 'indiscriminate' application of the four-part test established by Judge Friendly in *Johnson v. Glick* to cases involving claims of excessive force." *Id.* (citation omitted).

In light of *Reece*, it is clear that the Court properly rejected the instructions proffered by Mr. Koon, and instructed the jury pursuant to *Graham's* objective reasonableness standard. The jury instructions were proper, and Mr. Koon is not entitled to a new trial on this basis.

D. Messrs. Koon and Powell's Motions for New Trial Based on Kastigar Issues

Both Messrs. Koon and Powell argue that the admission of Mr. Briseno's videotaped prior testimony violated their Fifth Amendment rights pursuant to *Kastigar v. United States*, 406 U.S. 441 (1972).

This issue was debated, considered and decided by the Court during the trial. On or about April 5, 1993, Messrs. Koon, Powell, and Wind objected to the introduction of Mr. Briseno's videotaped prior testimony, arguing that Briseno had been exposed to their compelled IAD statements prior to testifying in the state court proceedings. It was undisputed that the IAD statements constitute compelled testimony subject to immunity under *Kastigar* and its progeny. 406 U.S. at 460. Accordingly, on April 5 and April 6, 1993, the Court conducted a *Kastigar* hearing. In a detailed narrative Order, the Court explained its finding that the government had sustained its burden and had proved that Mr. Briseno's testimony was not tainted by the other defendants' compelled statements. *See*

Order Re: "Kastigar" Hearing on Briseno's State Court Testimony, filed April 13, 1993.

In their motions for new trial, Mr. Koon and Mr. Powell do not cite new facts or legal authority that the Court failed to consider in its prior ruling on the *Kastigar* issue. The defendants simply refute the Court's finding that the government carried its burden.

For the reasons set forth in the Court's April 13, 1993 Order, the Court stands by its earlier finding that the government demonstrated by a preponderance of the evidence that Mr. Briseno's videotaped state court testimony was derived from sources wholly independent of the defendants' compelled statements, and was not shaped, altered, or affected by them.

As such, the government's introduction of Mr. Briseno's former testimony did not violate the defendants' Fifth Amendment rights under *Kastigar*, and neither Mr. Koon nor Mr. Powell is entitled to a new trial on this basis.

* * * *

CONCLUSION

For all of these reasons, the Court HEREBY DENIES Mr. Koon's motion for judgment of acquittal notwithstanding the verdict, DENIES Mr. Koon's motion for new trial, and DENIES Mr. Powell's motion for new trial.

IT IS SO ORDERED.

Dated: August 6, 1993

/s/ John G. Davies
JOHN G. DAVIES
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,	)	CASE NO. CR 92 686 JGD
Plaintiff,	)	ORDER GRANTING DEFENDANT KOON'S MOTION FOR EVIDENTIARY HEARING TO DETERMINE VIOLATION OF SELF-INCRIMINATION RIGHTS AND REQUEST FOR KASTIGAR HEARING
v.	)	
STACEY C. KOON, LAURENCE M. POWELL, TIMOTHY E. WIND, and THEODORE J. BRISENO,	)	
Defendants.	)	

On November 12, 1992, defendant Stacey C. Koon's Motion for Evidentiary Hearing to Determine Violation of Self-incrimination Rights and Request for *Kastigar* Hearing came before the Court for argument. The Court has reviewed and considered the parties' papers and the oral arguments of counsel. Based upon this review, the Court HEREBY GRANTS defendant Koon's motion.

PROCEDURAL BACKGROUND

On August 4, 1992, a federal grand jury returned a two count indictment against Defendants, Los Angeles Police Department (LAPD) officers Stacey C. Koon, Laurence M. Powell, Timothy E. Wind, and Theodore J. Briseno. This action arises from what is popularly known as the "Rodney King indicent" and has received national and international attention. Defendants herein were tried and acquitted of all but one of the charges arising from the same incident in the state court action, ***People v. Powell, et al.***, Ventura County Superior Court, No.

BA035498.[1] Widespread civil unrest in Los Angeles and other parts of the country followed said acquittals.

Count One of the federal indictment charges that Defendants Powell, Wind and Briseno, while acting under color of state law, aiding and abetting each other, used unnecessary force in the arrest of Rodney King on March 3, 1991, thereby depriving King of his constitutional rights in violation of 18 U.S.C. §§ 2 & 242. Count Two of the indictment charges that Defendant Koon, the sergeant in charge at the scene of the beating, willfully permitted the other defendants to beat King in his presence and under his supervision, in violation of 18 U.S.C. § 242.

18 U.S.C. § 2, under which Defendants Powell, Wind and Briseno are charged, provides:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission is punishable as a principle.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

Additionally, 18 U.S.C. § 242, under which all defendants are charged, provides in pertinent part as follows:

> Whoever, under color of any law . . . willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any [constitutional rights]. . . by reason of his color, or race, shall be fined not more than $1000 or imprisoned not more than one year, or both;

[1] All defendants except Powell were acquitted on all charges. The jury was unable to reach a verdict on one count against Powell, and as to that count a mistrial was declared.

> and if bodily injury results shall be fined under this title or imprisoned not more than ten years, or both.

The elements of the offense are: (1) the defendant must act under color of law and (2) willfully subject (3) an inhabitant to (4) a deprivation of constitutional rights (5) on account of the inhabitant's color of race. The willfulness or intent required must be directed at the deprivation of constitutional rights. That is, the defendant must not only intend his acts, but he must intend to deprive the inhabitant of his constitutional rights.

The indictment charges that Defendants intentionally deprived King of his constitutional right to be free from intentional use of unreasonable force. Thus, additional elements the government must prove at trial are whether Defendants' conduct constituted a use of excessive force, and whether such use was intentional.

THE RELIEF SOUGHT BY THE PRESENT MOTION

By the present motion, defendant Koon seeks an evidentiary hearing to require the government to prove that all evidence it proposes to use at trial is derived from legitimate sources, and not from Koon's immunized statement. Defendant Koon was at all relevant times herein, and is at the present time, an LAPD police officer. A criminal and administrative investigation of the matters underlying this case was conducted by investigators at the LAPD, defendant Koon's employer. As such, defendant Koon contends that he is entitled to certain procedural protections which are not afforded other individuals accused of criminal conduct.

On March 14, 1991 and on March 18, 1991, representatives of the LAPD Internal Affairs Division ("IAD") interviewed defendant Koon. At the interview, Detective Tzimeas of the IAD read defendant Koon his *Miranda* rights. Koon refused to waive his rights and declined to speak to the IAD.

Thereafter, Detective Tzimeas read defendant Koon his administrative rights and informed him that silence in the face of an interview request could lead to administrative discipline and discharge. Detective Tzimeas indicated that any statement made under compulsion of the threat of such discipline could not be used against Koon in a subsequent criminal proceeding. Under these circumstances, Mr. Koon agreed to answer questions, and was interviewed extensively by IAD officers. Following the interview, Detective Tzimeas asked defendant Koon whether he wished to sign the statements regarding his advisement of rights, and Koon declined.

Notwithstanding the assurances given to Koon that statements made in the IAD interview were immunized, counsel for defendant Koon later discovered that the government has in its possession a copy of the IAD interview transcript (the "IAD statements"). On or about August 27, 1992, counsel for defendant Koon received a letter from the government prosecutors indicating that they had rough transcripts of the IAD statements, but that "the government attorneys responsible for the investigation and prosecution of this case have not read, reviewed, or listened to those statements." *See* Salzman Declaration, para. 3. Accompanying this letter were 6,770 pages of discovery materials. The IAD statements were included in these materials at pages 4841 through 5106.

Based upon these events, Mr. Koon now moves the Court to conduct a hearing to determine whether any of the government attorneys and investigators assigned to try this case have been exposed to and tainted by Koon's IAD statements. The government argues that a *Kastigar* hearing is unnecessary as all of the government attorneys and investigators responsible for this case have been carefully and deliberately shielded from exposure to Mr. Koon's IAD statements.

DISCUSSION

The issue to be decided is whether defendant Koon is entitled to an evidentiary hearing to determine whether any of

the government's evidence to be presented at trial is derived from defendant Koon's immunized IAD statement.

A. The Standard

Pursuant to the Fifth Amendment of the United States Constitution, "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. Amend. V. Because the privilege against self-incrimination is "the essential mainstay of our adversary system," the Constitution requires "that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple, expedient of compelling it from his own mouth." *See Miranda v. Arizona*, 384 U.S. 436, 460, 86 S.Ct. 1602, 1620, 16 L.Ed.2d 694 (1966).

In accordance with this fundamental principle, the protection against coerced statements extends to public employees who, during the course of an administrative investigation, must choose either to incriminate themselves or to forfeit their jobs. *See Garrity v. New Jersey*, 385 U.S. 493, 500, 87 S.Ct. 616, 620, 17 L.Ed.2d 562 (1967). Thus where a police officer, after invoking his Fifth Amendment rights, makes a statement under threat of removal from office, the statement is considered the product of compulsion and may not be admitted as evidence or used as an "investigative lead" against the officer in any criminal proceeding. *See Kastigar v. United States*, 406 U.S. 441, 460, 92 S.Ct. 1653, 1664-65, 32 L.Ed.2d 212 (1972); *Garrity*, 385 U.S. at 497, 87 S.Ct. at 618-19.

Once a defendant has demonstrated that his testimony is subject to such immunity, the government has the burden to show that the evidence it intends to use in a subsequent criminal prosecution is derived from a source wholly independent of the compelled testimony. *See Kastigar*, 406 U.S. at 460, 92 S.Ct. at 1665; *United States v. Rogers*, 722 F.2d 557, 560 (9th Cir. 1983), *cert. denied*, 469 U.S. 835 (1984). The government cannot meet its burden by merely negating the taint, but rather must prove the existence of an independent source by a

preponderance of the evidence. *See Kastigar*, 406 U.S. at 460, 92 S.Ct. at 1665; *United States v. Crowson*, 828 F.2d 1427, 1429 (9th Cir. 1987), *cert. denied*, 488 U.S. 831 (1988).

"A trial court must normally hold a hearing (a '*Kastigar* hearing') for the purpose of allowing the government to demonstrate that it obtained all the evidence it proposes to use from sources independent of the compelled testimony." *See United States v. North*, 910 F.2d 843 (D.C. Cir. 1990). Where required, a *Kastigar* hearing may be held pre-trial, post-trial, mid-trial as evidence is offered, or by some combination of these methods. *Id.*

Within the content of a *Kastigar* hearing, the Ninth Circuit has permitted the government to meet its burden of proof as to the existence of independent, prior sources through affidavits. *See Rogers*, 722 F.2d at 557; *see also Crowson*, 828 F.2d 1427. Other circuits have gone farther and held that a *Kastigar* hearing is unnecessary where the government's documentary evidence conclusively demonstrates the existence of an independent source. *See United States v. Provenzano*, 620 F.2d 985, 1005 (3d Cir.), *cert. denied*, 449 U.S. 899 (1980); *United States v. Biaggi*, 909 F.2d 662, 689-90 (2d Cir.) (no hearing necessary where, at the conclusion of the trial, transcripts of the immunized testimony and the trial record demonstrated the existence of an independent source), *cert. denied*, 111 S.Ct. 1102, 113 L.Ed.2d 213 (1991).

B. Analysis

In this case, it is undisputed that before defendant Koon made statements to the IAD, he invoked his Fifth Amendment rights and was warned that he would suffer disciplinary action if he failed to answer questions pursuant to the ongoing administrative investigation. Mr. Koon was also told that his statements could not be used against him in subsequent criminal proceedings. The government concedes these facts, as well as the conclusion that Koon's IAD statements constitute compelled testimony subject to immunity under *Kastigar* and its progeny. 406 U.S. at 460, 92 S.Ct. at 1665.

As such, the government has the burden to prove that all evidence it proposes to present at trial derives from a source wholly independent of the compelled statements. *Id.* If a *Kastigar* hearing is held, the government may meet its burden through affidavits. *Rogers*, 722 F.2d at 557.

However, in opposing the present motion, the government argues that sworn affidavits may be submitted in lieu of a *Kastigar* hearing. Thus, the government urges the Court to find that it has met its burden to prove the existence of an independent source for all its evidence by submitting declaration testimony to that effect.

According to the sworn affidavits submitted by the government, police misconduct cases commonly involve compelled statements made in the course of an investigation by a local police department's internal affairs division. *See* Declaration of Karla Dobinski, para. 4. For this reason, an pursuant to the doctrine established in *Garrity*, 385 U.S. at 497, 87 S.Ct. at 618-19, the Criminal Section of the Civil Rights Division of the Department of Justice has instituted standard internal procedures for segregating immunized statements from the individuals responsible for prosecuting the case. *Id.*, para. 5. Under these standard procedures, attorneys and/or paralegals (the "*Garrity* reviewers") review the evidence, segregating and transferring to a separate file the compelled statements and any information derived therefrom. *Id.*, para. 6. The *Garrity* reviewers may not participate in discussions with the prosecution team concerning either the content of the compelled statements or the strategy for investigation and trial. *Id.*, para. 7.

According to the attorney who headed the *Garrity* team in this case, these standard procedures were followed with respect to defendant Koon's compelled statements. *Id.*, para. 9. The *Garrity* reviewers have conducted a systematic examination of all government materials from any source. *Id.*, para. 10. "Only evidence or materials which [they] determined to be from a source independent of the compelled statements was disseminated to the prosecution team." *Id.* Copies of the compelled statements, evidence which revealed the contents of those

statements, or evidence for which the *Garrity* team was unable to identify an independent source was never provided to the prosecution team attorneys or investigators. *Id.* Thus, the exhaustive declaration testimony supplied by the government indicates the existence of an independent source, and expressly denies that individuals involved in prosecution of this case had access to either the compelled statements or evidence derived therefrom.

Additionally, the government has filed with the Court the sworn declaration testimony of Barry F. Kowalski and Steven D. Clymer, the two lead prosecutors in the instant action, and David L. Harris, the FBI agent in charge of the investigation in this case. Consistent with the Criminal Section's standard internal procedures, Kowalski, Clymer, and Harris testify that they "have not seen, read, heard, or used, directly or indirectly, any statements or portions of statements" that defendant Koon gave to the IAD. *See* Kowalski Declaration. para. 3; Clymer Declaration, para. 3; Harris Declaration, para. 7. Each of the declarants has instructed the attorneys, support staff, and special agents under his direction to refrain from seeing, reading, hearing or using such statements. *See* Kowalski Declaration, para. 6; Clymer Declaration, para. 6; Harris Declaration, para. 9. Neither Kowalski nor Clymer has discussed the investigative or trial strategy of this case with the *Garrity* reviewers. *See* Kowalski Declaration, para. 5; Clymer Declaration, para. 5.

In view of the availability of such exhaustive declaration testimony, a *Kastigar* hearing may be unnecessary. The sworn affidavits submitted by the government appear to serve the same fundamental purposes that a *Kastigar* hearing will advance. A government official has sworn that all of the evidence to be presented at trial is derived from a source independent of defendant Koon's compelled testimony. The government has presented to the Court a cogent explanation of the procedures whereby prosecuting attorneys and investigators were shielded form Koon's immunized statements and all evidence derived therefrom.

However, as set forth by the Supreme Court in *Kastigar*, the government's affirmative duty to establish an independent source for its evidence is designed to provide defendant a "very substantial protection." 406 U.S. at 460-61, 92 S.Ct. at 1664-65. By conducting a hearing, the Court can ensure that such Mr. Koon is afforded such substantial protection, and thereby protect the integrity of this proceeding. *See e.g., United States v. Zielezinski*, 740 F.2d 727, 734 (9th Cir. 1984). Thus, defendant Koon is entitled to a hearing at which he may cross-examine the government's testimony to establish that the command of the Fifth Amendment has been satisfied. *Id.*

CONCLUSION

The government, by filing exhaustive sworn affidavits, has arguably met its burden to prove the existence of an independent source. Nevertheless, to establish beyond doubt that defendant Koon receives the substantial protection afforded him under the Fifth Amendment, the Court HEREBY GRANTS defendant Koon's motion for a *Kastigar* hearing, and sets said hearing for Monday, January 4, 1993 at 3:30 p.m.

IT IS SO ORDERED.

Dated: November 30, 1992

/s/ John G. Davies
Unted States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,	)	CASE NO. CR 92 686 JGD
Plaintiff,	)	ORDER RE: "KASTIGAR" HEARING ON BRISENO'S STATE COURT TESTIMONY
v.	)	
STACEY C. KOON, LAURENCE M. POWELL, TIMOTHY E. WIND, and THEODORE J. BRISENO,	)	
Defendants.	)	

As part of its rebuttal case, the government seeks to introduce videotaped portions of Mr. Briseno's state court testimony. Defendants Koon, Powell, and Wind argue that the introduction of the videotaped former testimony violates their Fifth Amendment rights, since Briseno was exposed to their compelled IAD statements prior to testifying in the state court proceedings. On April 5 and 6, 1993, the Court conducted a *Kastigar* hearing to establish whether the government's introduction of defendant Briseno's former testimony constitutes a prohibited use of the other defendants' compelled IAD statements. The Court has reviewed and considered the defendant's written objections, Mr. Saltzman's declaration testimony, the defendants' compelled IAD statements, the government's annotated transcript of Briseno's state court testimony, and the arguments presented at the *Kastigar* hearing. Based upon this review, the Court HEREBY FINDS that the government has met its burden, and has shown by a

preponderance of the evidence that the videotaped state court testimony it intends to present derives from sources wholly independent of the defendants' compelled IAD statements, and is not shaped, altered, or affected by Briseno's exposure to said compelled statements. *See Kastigar v. United States*, 406 U.S. 441, 460, 92 S.Ct. 1653, 1655, 32 L.Ed.2d 212 (1972); *United States v. Poindexter*, 951 F.2d 369, 373 (D.C. Cir.), *cert. denied*, 113 S.Ct. 656 (1992); *United States v. North*, 910 F.2d 843, 863-65 ("*North I*"), *modified*, 920 F.2d 940 (D.C. Cir.) ("*North II*"), *cert. denied*, 111 S.Ct. 2235 (1991).

DISCUSSION

A. The Standard

Pursuant to the Fifth Amendment of the United States Constitution, "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. Amend. V. Because the privilege against self-incrimination is "the essential mainstay of our adversary system," the Constitution requires "that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple, expedient of compelling it from his own mouth." *See Miranda v. Arizona*, 384 U.S. 436, 460, 86 S.Ct. 1602, 1620, 16 L.Ed.2d 694 (1966).

In accordance with this fundamental principle, the protection against coerced statements extends to public employees who, during the course of an administrative investigation, must choose either to incriminate themselves or to forfeit their jobs. *See Garrity v. New Jersey*, 385 U.S. 493, 500, 87 S.Ct. 616, 620, 17 L.Ed.2d 562 (1967). Thus where a police officer, after invoking his Fifth Amendment rights, makes a statement under threat of removal from office, the statement is considered the product of compulsion and may not be admitted as evidence or used as an "investigative lead" against the officer in any criminal proceeding. *See Kastigar*, 406 U.S. at 460, 92 S.Ct. at 1664-65; *Garrity*, 385 U.S. at 497, 87 S.Ct. at 618-19.

Once a defendant has demonstrated that his testimony is subject to such immunity, the government has the burden to show that the evidence it intends to use in a subsequent criminal prosecution is not tainted, but is derived from a legitimate source wholly independent of the compelled testimony. *See Kastigar*, 406 U.S. at 460, 92 S.Ct. at 1665; *Poindexter*, 951 F.2d at 373. Further, because *Kastigar* prohibits any use of compelled testimony, direct or indirect, a witness's recollection may not be refreshed, nor may his testimony be "shaped, altered, or affected," by exposure to a defendant's compelled testimony. *See Poindexter*, 951 F.2d at 373 (citing *North I*, 910 F.2d at 860-63). The government cannot meet its burden by merely negating the taint; rather, it must affirmatively prove the absence of taint by a preponderance of evidence. *See Kastigar*, 406 U.S. at 460, 92 S.Ct. at 1665; *United States v. Crowson*, 828 F.2d 1427, 1429 (9th Cir. 1987), *cert. denied*, 488 U.S. 831 (1988);.

"A trial court must normally hold a hearing (a '*Kastigar* hearing') for the purpose of allowing the government to demonstrate that it obtained all the evidence it proposes to use from sources independent of the compelled testimony." *See North I*, 910 F.2d at 854. Where required, a *Kastigar* hearing may be held pre-trial, post-trial, mid-trial as evidence is offered, or by some combination of these methods. *Id.*

B. Analysis

It is undisputed that the IAD statements of defendants Koon, Powell, and Wind constitute compelled testimony subject to immunity under *Kastigar* and its progeny. 406 U.S. at 460, 92 S.Ct. at 1665. The parties have stipulated that Mr. Briseno received his co-defendant's compelled IAD statements in a package of *Skelly* materials[1], and that Briseno read the IAD

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[1] Pursuant to *Skelly v. State Personnel Bd.*, 15 Cal. 3d 194, 124 Cal. Rptr. 14, 539 P.2d 774 (1975), an LAPD officer who faces disciplinary proceedings is provided a "*Skelly* package," containing all of the evidence from internal

[Footnote continued on next page]

statements, or summaries thereof, before he testified at the state court proceedings. Thus, the government has the burden to prove by a preponderance of the evidence that Mr. Briseno's state court testimony was neither derived from, nor influenced by, the other defendants' compelled statements. *Kastigar*, 406 U.S. at 460, 92 S.Ct. at 1665; *Poindexter*, 951 F.2d at 373.

In support of its position, the government has submitted an annotated transcript of the relevant portions of Mr. Briseno's state court testimony. As demonstrated in this line-by-line treatment, much of Mr. Briseno's former testimony relates to matters not addressed in any of the compelled IAD statements. To the extent that Mr. Briseno's state court testimony does not implicate the compelled statements, the government has shown by a preponderance of the evidence that it is untainted.

With regard to the portions of Briseno's state court testimony which overlap with the subject matter of his co-defendants' IAD statements, the annotated transcript indicates that any information contained in the IAD statements was also available through independent sources, including the George Holliday videotape, and the state trial testimony of Melanie Singer, Timothy Singer, Rolando Solano, Stacey Koon, and Laurence Powell. Mr. Briseno was exposed to all of these sources prior to giving his own testimony at the state trial. Thus, the annotated transcript establishes the existence of independent sources for Briseno's state court testimony.

By itself, however, this showing is insufficient. A prohibited use of compelled testimony occurs if a witness's testimony is in any way "shaped, altered, or affected" by exposure to the compelled testimony. *Poindexter*, 951 F.2d at

---

[Footnote continued from previous page]

investigations of the matter, including the compelled statements of other LAPD officers.

373; *North I*, 910 F.2d at 863. Thus, the government must affirmatively prove that Mr. Briseno's state court testimony was in no way influenced by Briseno's exposure to his co-defendants' compelled statements.

Here, the government's efforts to sustain its burden have met with two obstacles. First, the government did not "can" Mr. Briseno's testimony before his exposure to the compelled IAD statements. *See North II*, 920 F.2d at 943 (recognizing that, where the prosecutor fails to "can" testimony, "it may well be extremely difficult for the prosecutor to sustain its burden"). Second, at the *Kastigar* hearing, Mr. Briseno exercised his Fifth Amendment right and declined to testify regarding his ability during the state trial to segregate the effects of his exposure to the IAD statements. *See Poindexter*, 951 F.2d at 369 ("where a substantially exposed witness does not persuasively claim that he can segregate the effects of his exposure," prosecution does not meet its burden by pointing to the witness's other untainted statements).

These obstacles, though significant, are not necessarily insurmountable. As the *North II* court expressly stated, it is not a requirement that the testimony of an exposed witness be pre-recorded; rather, such "canning" is one method by which the prosecution may meet its burden. 920 F.2d at 942-43; *see also Poindexter*, 951 F.2d at 376 (declining to adopt suggestion that a pre-recorded statement is the only reliable proof that defendant's compelled testimony is not used against him). The government is not "barred from trying to show in any fashion that a witness' testimony was not influenced by the [compelled testimony]." *North II*, 920 F.2d at 943.

Thus, the Court need not confine the government to any particular method of proof. Here, given the totality of the circumstances, the government has produced a preponderance of evidence that Mr. Briseno's former testimony was not influenced by his exposure to the IAD statements.

First, the government's inability to produce a pre-recorded or "canned" version of Briseno's state court testimony is largely

attributable to Briseno's successful efforts to dodge the IAD. Unlike his three co-defendants, Briseno did not provide a compelled statement during the course of the LAPD internal investigation. He was inexplicably unavailable to give an interview.

Second, Mr. Briseno has independent personal knowledge of the events to which he testified. Had Briseno taken the stand and claimed that he lacked independent recollection of events in which he was personally involved, his claim would have been incredible. *See e.g., Poindexter*, 951 F.2d at 376 (district court would have correctly rejected an assertion that North remembered little or nothing of events in which he participated). The Court recognizes that a showing of personal knowledge does not, by itself, rule out the possibility that Briseno's memory was influenced by the compelled IAD statements. *See Poindexter*, 951 F.2d at 374. But here, Briseno was extensively exposed to the testimony of other witnesses, including defendants Powell and Koon, immediately prior to giving his own testimony at the state trial. Given this contemporaneous exposure to independent sources, as well as Briseno's personal knowledge of the events to which he testified, it is unlikely that Briseno's state court testimony was influenced by summarized IAD statements he received in a *Skelly* package nearly a year earlier[2].

This conclusion is bolstered by the inconsistency between Mr. Briseno's state court testimony and his co-defendants' IAD statements. The mere fact that a witness proffers a rebuttal of compelled testimony does not establish that his testimony is untainted. *See Poindexter*, 951 F.2d at 374. However, upon review of the relevant transcripts, the Court finds unconvincing

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[2] The date on which Mr. Briseno received and reviewed the *Skelly* materials, which included summarized versions of the co-defendants' IAD statements, is not subject to the parties' stipulation. However, Mr. Koon represents that the *Skelly* materials were provided to Mr. Briseno on April 16, 1991, nearly a year before Briseno testified at the state trial on April 13, 1992. *See* Defendants' Opp. to Admission of Former Testimony, filed April 5, 1993.

the proposition that Briseno's account of the underlying events, as set forth in his state court testimony, was shaped by the inconsistent accounts contained in his co-defendants' IAD statements.

Finally, unlike the witnesses in *North* who were "substantially exposed" to compelled testimony, there is no evidence that Briseno's exposure to his co-defendants' IAD statements went beyond a cursory reading. *Compare North*, 910 F.2d at 863-64 ("many grand jury and trial witnesses were thoroughly soaked in North's immunized testimony"). Of course, even minimal exposure to compelled testimony may result in taint if it influences a witness's memory. However, Briseno's personal recollection, fortified by the exhaustive testimony of other witnesses at the state trial, is unlikely to have been shaped by a brief and remote exposure to the IAD statements of other officers.

Given the totality of the circumstances, the Court finds it more likely than not that Briseno's state court testimony was uninfluenced by his co-defendants' compelled statements, but was based on personal recollection, perhaps refreshed by recent exposure to the state court testimony of other witnesses.

CONCLUSION

For these reasons, the Court HEREBY FINDS that the government has met its burden by a preponderance of the evidence. Accordingly, the government's introduction of videotaped portions of Mr. Briseno's former state court testimony is permissible, and does not constitute a prohibited use of defendants Koon, Powell, and Wind's compelled IAD statements.

IT IS SO ORDERED.

Dated: April 13, 1993

/s/ John G. Davies
JOHN G. DAVIES
United States District Judge

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

February 1992 Grand Jury

UNITED STATES OF AMERICA,	)	
	)	
	)	CR 92-686
Plaintiff,	)	
	)	INDICTMENT
v.	)	
	)	[18 U.S.C. § 242:
STACEY C. KOON,	)	Deprivation of Rights
LAURENCE M. POWELL,	)	Under Color of Law;
TIMOTHY E. WIND, and	)	18 U.S.C. § 2; Aiding
THEODORE J. BRISENO,	)	and Abetting]
	)	
Defendants.	)	
	)	

The Grand Jury charges:

COUNT ONE

[18 U.S.C. §§ 2 & 242]

On or about March 3, 1991, in Los Angeles, California, within the Central District of California, defendants LAURENCE M. POWELL, TIMOTHY E. WIND, and THEODORE J. BRISENO, then police officers with the Los Angeles Police Department, while acting under color of the laws of the state of California, aiding and abetting each other, did willfully strike with batons, kick, and stomp Rodney Glen King, an inhabitant of the state of California, resulting in bodily injury to Rodney Glen King, and thereby did willfully deprive Rodney Glen King of the right preserved and protected by the Constitution of the United States not to be deprived of liberty

without due process of law, including the right to be secure in his person and free from the intentional use of unreasonable force by one making an arrest under color of law, all in violation of Title 18, United States Code, Sections 2 and 242.

COUNT TWO

[18 U.S.C. § 242)

On or about March 3, 1991, in Los Angeles, California, within the Central District of California, defendant STACEY C. KOON, then a sergeant with the Los Angeles Police Dekartment, while acting under color of the laws of the State of California, did willfully permit other Los Angeles Police Officers in his presence and under his supervision, namely Laurence M. Powell, Timothy E. Wind, and Theodore J. Briseno, unlawfully to strike with batons, kick, and stomp Rodney Glen King, an inhabitant of the State of California, while Rodney Glen King was in the custody of those officers, and did willfully fail to prevent this unlawful assault; resulting in bodily injury to Rodney Glen King, and thereby did willfully deprive Rodney Glen King of the right preserved and protected by the Constitution of the United States not to be deprived of liberty without due process of law, including the right to be kept free from harm while in official custody, all in violation of Title 18, United States Code, Section 242.

A TRUE BILL

_____

Foreperson

LOURDES G. BAIRD
United States Attorney

ROBERT L. BROSIO
Assistant United States Attorney
Chief, Criminal Division

JOHN R. DUNNE
Assistant Attorney General
Civil Rights Division

BARRY F. KOWALSKI
Deputy Chief
Criminal Section
Civil Rights Division

APPENDIX H

CONSTITUTIONAL PROVISIONS, STATUTES, AND SENTENCING GUIDELINES

U.S. Const. Amend. IV

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.

U.S. Const. Amend VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. Amend. XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

18 U.S.C. § 242. Deprivation of rights under color of law

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if bodily injury results shall be fined under this title or imprisoned not more than ten years, or both; and if death results shall be subject to imprisonment for any term of years or for life.

18 U.S.C. § 3553. Imposition of a sentence

(a) Factors to be considered in imposing a sentence. The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines that are issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1) and that are in effect on the date the defendant is sentenced;

(5) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2) that is in effect on the date the defendant is sentenced;

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

(b) Application of guidelines in imposing a sentence. The Court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing

Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

(c) **Statement of reasons for imposing a sentence.** The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence—

(1) is of the kind, and within the range, described in subsection (a)(4), and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons to the Probation System, and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

(d) **Presentence procedure for an order of notice.** Prior to imposing an order of notice pursuant to section 3555, the court shall give notice to the defendant and the Government that it is considering imposing such an order. Upon motion of the defendant or the Government, or on its own motion, the court shall—

(1) permit the defendant and the Government to submit affidavits and written memoranda addressing matters relevant to the imposition of such an order;

(2) afford counsel an opportunity in open court to address orally the appropriateness of the imposition of such an order; and

(3) include in its statement of reasons pursuant to subsection (c) specific reasons underlying its determinations regarding the nature of such an order.

Upon motion of the defendant or the Government, or on its own motion, the court may in its discretion employ any additional procedures that it concludes will not unduly complicate or prolong the sentencing process.

(e) **Limited authority to impose a sentence below a statutory minimum.** Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

U.S.S.G. §2A2.2 Aggravated Assault

(a) Base Offense Level: **15**

(b) Specific Offense Characteristics

(1) If the assault involved more than minimal planning, increase by **2** levels.

(2) (A) If a firearm was discharged, increase by **5** levels; (B) if a dangerous weapon (including a firearm) was otherwise used, increase by **4** levels; (C) if a dangerous weapon (including a firearm) was brandished or its use was threatened, increase by **3** levels.

(3) If the victim sustained bodily injury increase the offense level according to the seriousness of the injury:

Degree of Bodily Injury in Level	Increase
(A) Bodily Injury	add **2**
(B) Serious Bodily Injury	add **4**
(C) Permanent or Life-Threatening Bodily Injury	add **6**

(D) If the degree of injury is between that specified in subdivisions (A) and (B), add **3** levels; or

(E) If the degree of injury in between that specified in subdivisions (B) and (C), add **5** levels.

Provided, however, that the cumulative adjustments from (2) and (3) shall not exceed **9** levels.

(4) If the assault was motivated by a payment or offer of money or other thing of value, increase by **2** levels.

Commentary

Statutory Provisions: 18 U.S.C. §§ 111, 112, 113(b), (c), (f), 114, 115(a), (b)(1), 351(e). For additional statutory provisions(s), see Appendix A (Statutory Index).

1. *"Aggravated assault" means a felonious assault that involved (a) a dangerous weapon with intent to do bodily harm (i.e., not merely to frighten), or (b) serious bodily injury, or (c) an intent to commit another felony.*

2. *Definitions of "more than minimal planning," "firearm," "dangerous weapon," "brandished," "otherwise used," "bodily injury," "serious bodily injury," and "permanent or life-threatening bodily injury," are found in the Commentary to* §1B1.1 (Application Instructions).

3. *This guideline also covers attempted manslaughter and assault with intent to commit manslaughter. Assault with intent to commit murder is covered by §2A2.1. Assault with intent to commit rape is covered by §2A3.1.*

Background: This section applies to serious (aggravated) assaults. Such offenses occasionally may involve planning or be committed for hire. Consequently, the structure follows §2A2.1.

There are a number of federal provisions that address varying degrees of assault and battery. The punishments under these statutes differ considerably, even among provisions directed to substantially similar conduct. For example, if the assault is upon certain federal officers "while engaged in or on account of ... official duties," the maximum term of imprisonment is ten years. However, if the same weapon is used to assault a person not otherwise specifically protected, the maximum term of imprisonment under 18 U.S.C. § 113(c) is five years. If the assault results in serious bodily injury, the maximum term of imprisonment under 18 U.S.C. § 113(f) is ten years, unless the injury constitutes maiming by scalding, corrosive, or caustic substances under 18 U.S.C. § 114, in which case the maximum term of imprisonment is twenty years.

§2H1.4. Interference with Civil Rights Under Color of Law

(a) Base Offense Level (Apply the greater):

(1) **10**; or

(2) **6** plus the offense level applicable to any underlying offense.

Commentary

Statutory Provisions: 18 U.S.C. § 242.

1. *"6 plus the offense level applicable to any underlying offense" means 6 levels above the offense level for any underlying criminal conduct. See the discussion in the Commentary to §2H1.1.*

2. *Do not apply the adjustment from §3B1.3 (Abuse of Position of Trust or Use of Special Skill).*

Background: This maximum term of imprisonment authorized by 18 U.S.C. § 242 is one year if no bodily injury results, ten years if bodily injury results, and life imprisonment if death results. A base offense level of 10 is prescribed at §2H1.4(a)(1) providing

a guideline sentence near the one-year statutory maximum for cases not resulting in death or bodily injury because of the compelling public interest in deterring and adequately punishing those who violate civil rights under color of law. The Commission intends to recommend that this one-year statutory maximum penalty be increased. An alternative base offense level is provided at §2H1.4(a)(2). The 6-level increase under subsection (a)2) reflects the 2-level increase that is applied to other offenses covered in this Part plus a 4-level increase for the commission of the offense under actual or purported legal authority. This 4-level increase is inherent in the base offense level of 10 under subsection (a)(1).

Enhancement under §3B1.3 (Abuse of Position of Trust or Use of Special Skill) is inappropriate because the base offense level in §2H1.4(a) reflects that the abuse of actual or purported legal authority is inherent in the offense.

§5K2.0. Grounds for Departure (Policy Statement)

Under 18 U.S.C. § 3553(b) the sentencing court may impose a sentence outside the range established by the applicable guideline, if the court finds "that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." Circumstances that may warrant departure from the guidelines pursuant to this provision cannot, by their very nature, be comprehensively listed and analyzed in advance. The controlling decision as to whether and to what extent departure is warranted can only be made by the courts. Nonetheless, this subpart seeks to aid the court by identifying some of the factors that the Commission has not been able to take into account fully in formulating the guidelines. Any case may involve factors in addition to those identified that have not been given adequate consideration by the Commission. Presence of any such factor may warrant departure from the guidelines, under some circumstances, in the discretion of the sentencing court. Similarly, the court may depart from the guidelines, even though the reason for departure is taken into consideration in the

guidelines (e.g., as a specific offense characteristic or other adjustment), if the court determines that, in light of unusual circumstances, the guideline level attached to that factor is inadequate.

Where, for example, the applicable offense guideline and adjustments do take into consideration a factor listed in this subpart, departure from the applicable guidelines range is warranted only if the factor is present to a degree substantially in excess of that which ordinarily is involved in the offense. Thus, disruption of a governmental function, §5K2.7, would have to be quite serious to warrant departure from the guidelines when the applicable offense guideline is bribery or obstruction of justice. When the theft offense guidelines is applicable, however, and the theft caused disruption of a governmental function, departure from the applicable guideline range more readily would be appropriate. Similarly, physical injury would not warrant departure from the guidelines when the robbery offense guideline is applicable because the robbery guideline includes a specific adjustment based on the extent of any injury. However, because the robbery guideline does not deal with injury to more than one victim, departure would be warranted if several persons were injured.

Also, a factor may be listed as a specific offense characteristic under one guideline but not under all guidelines. Simply because it was not listed does not mean that there may not be circumstances when that factor would be relevant to sentencing. For example, the use of a weapon has been listed as a specific offense characteristic under many guidelines, but not under immigration violations. Therefore, if a weapon is a relevant factor to sentencing for an immigration violation, the court may depart for this reason.

An offender characteristic or other circumstance that is not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range may be relevant to this determination if such characteristic or circumstance is present to an unusual degree and distinguishes the case from the

"heartland" cases covered by the guidelines in a way that is important to the statutory purposes of sentencing.

Commentary

The last paragraph of this policy statement sets forth the conditions under which an offender characteristic or other circumstance that is not ordinarily relevant to a departure from the applicable guideline range may be relevant to this determination. The Commission does not foreclose the possibility of an extraordinary case that, because of a combination of such characteristics or circumstances, differs significantly from the "heartland" cases covered by the guidelines in a way that is important to the statutory purposes of sentencing, even though none of the characteristics or circumstances individually distinguishes the case. However, the Commission believes that such cases will be extremely rare.

In the absence of a characteristic or circumstance that distinguishes a case as sufficiently atypical to warrant a sentence different from that called for under the guidelines, a sentence outside the guideline range is not authorized. See 18 U.S.C. § 3553(b). For example, dissatisfaction with the available sentencing range or a preference for a different sentence than that authorized by the guidelines is not an appropriate basis for a sentence outside the applicable guideline range.

§5K2.10. Victim's Conduct (Policy Statement)

If the victim's wrongful conduct contributed significantly to providing the offense behavior, the court may reduce the sentence below the guideline range to reflect the nature and circumstances of the offense. In deciding the extent of a sentence reduction, the court should consider:

(a) the size and strength of the victim, or other relevant physical characteristics, in comparison with those of the defendant;

(b) the persistence of the victim's conduct and any efforts by the defendant to prevent confrontation;

(c) the danger reasonably perceived by the defendant, including the victim's reputation for violence;

(d) the danger actually presented to the defendant by the victim; and

(e) any other relevant conduct by the victim that substantially contributed to the danger presented.

Victim misconduct ordinarily would not be sufficient to warrant application of this provision in the context of offenses under Chapter Two, Part A.3 (Criminal Sexual Abuse). In addition, this provision usually would not be relevant in the context of non-violent offenses. There may, however, be unusual circumstances in which substantial victim misconduct would warrant a reduced penalty in the case of a non-violent offense. For example, an extended course of provocation and harassment might lead a defendant to steal or destroy property in retaliation.

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Nos. 94-1664 and 94-8842

In the Supreme Court of the United States

OCTOBER TERM, 1994

STACEY C. KOON, PETITIONER

v.

UNITED STATES OF AMERICA

LAURENCE M. POWELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in exercising de novo review over the district court's downward departures under the Sentencing Guidelines.

2. Whether the court of appeals applied the correct legal standard in finding that testimony of a government witness was not tainted by exposure to compelled statements made by petitioners.

3. Whether the jury was properly instructed on the count charging petitioner Koon with depriving the victim in this case of his right to be kept free from harm while in official custody.

4. Whether successive state and federal prosecutions of petitioners for the same conduct violated the Double Jeopardy Clause.

5. Whether a remark made by government counsel in closing argument constituted plain error.

6. Whether the admission of the videotape of co-defendant Briseno's testimony from the state trial violated the Confrontation Clause.

7. Whether the jury was properly instructed on the element of willfulness.

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In the Supreme Court of the United States

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No. 94-1664

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-79a)[1] is reported at 34 F.3d 1416. The sentencing opinion of the district court (Pet. App. 94a-138a) is reported at 833 F. Supp. 769.

[1] "Pet. App." references are to the appendix to the petition in No. 94-1664.

JURISDICTION

The judgment of the court of appeals was entered on August 19, 1994. The petitions for rehearing were denied on January 12, 1995. Pet. App. 80a-81a. Koon's petition for a writ of certiorari was filed on April 10, 1995. Powell's petition for a writ of certiorari was filed on April 12, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Central District of California, petitioner Powell was convicted of willfully striking Rodney King during his arrest, in violation of 18 U.S.C. 242. Petitioner Koon was convicted of willfully permitting other police officers to strike King during his arrest, in violation of 18 U.S.C. 242. Petitioners were sentenced to 30 months' imprisonment. The court of appeals affirmed the convictions, but vacated the sentences and remanded for sentencing.

1. In the early morning hours of March 3, 1991, Rodney King was speeding on a freeway in Los Angeles, California. Los Angeles Police Department (LAPD) officers pursued King. The pursuit ended when King pulled his car over at an entrance to the Hansen Dam recreation area. Petitioner Powell was one of the LAPD officers who pursued King. Petitioner Koon, an LAPD sergeant, arrived after the pursuit had ended, and took command of the scene. Pet. App. 2a.

Officers ordered King and his two passengers to get out of the car and assume a felony prone position, *i.e.* to lie face down on the ground, with arms and legs spread. The two passengers complied with the officers' instructions. King got out of the car, but did

not lie down. Eventually, King got down on his hands and knees but did not assume the felony prone position. Four officers, including Powell, attempted to force King into that position. King resisted, and the officers retreated. Koon fired two taser darts from an electric stun gun into King. Pet. App. 2a.

The events that followed were captured on the Holliday videotape, which was an exhibit at trial. As the videotape begins, it shows that King rose from the ground in an attempt to escape. When he charged in Powell's direction, Powell struck King with his baton. Powell and another officer continued to strike King with their batons, and King fell to the ground. From the 18th to the 30th second on the tape, King attempted to get up, and Powell and the other officer again struck King with their batons. Pet. App. 2a-3a.

From the 35th to the 51st second, Powell repeatedly struck King with his baton. At approximately the 43d second, one of the blows fractured King's leg. At the 55th second, Powell struck King on the chest, and King rolled onto his stomach and lay prone. At that point, the officers stepped back and observed King for approximately ten seconds. Powell began to reach for his handcuffs. Pet. App. 3a.

At 1:07 on the video tape, officer Briseno stomped on King. After King writhed in response, Powell and another officer hit King with a series of baton blows. At approximately 1:29, King put his hands behind his neck and he was then handcuffed. King was treated at the hospital for a fractured right leg, multiple facial fractures, and multiple bruises and contusions. Pet. App. 3a.

Petitioners and two other officers were tried in state court in Simi Valley, California, on charges of assault with a deadly weapon and excessive use of force

by a police officer. The four officers were acquitted on all charges, except for one count against Powell that resulted in a hung jury. Pet. App. 4a.

2. Thereafter, petitioners and the other two officers were indicted by a federal grand jury. Powell and the other two officers were charged with willfully using unreasonable force during the arrest, in violation of 18 U.S.C. 242. Koon was charged with willfully permitting the other officers to strike King, in violation of 18 U.S.C. 242. After a trial, a jury convicted petitioners and acquitted the other two officers. Pet. App. 4a.

Petitioners' offense level and Criminal History Category led to a prescribed sentencing range of 70-87 months' imprisonment. The district court awarded a five-level and a three-level departure, however, which led to a prescribed range of 30-37 months. The district court then sentenced petitioners to 30 months' imprisonment. Pet. App. 94a-138a.

The court awarded a five-level downward departure under Sentencing Guidelines § 5K2.10, reasoning that King's misconduct had provoked petitioners' initial use of force and that the incident involved a "dynamic arrest situation." Pet. App. 57a, 121a-124a, 132a. The court granted an additional three-level downward departure based on three factors: (1) the additional punishment resulting from petitioners' loss of their jobs and susceptibility to abuse in prison; (2) the absence of a need to protect the public from further criminal activity; and (3) the "specter of unfairness" resulting from successive state and federal prosecutions for the same conduct. *Id.* at 124a-131a.

3. The court of appeals affirmed petitioners' convictions. The court vacated petitioners' sentences,

however, and remanded for resentencing. Pet. App. 1a-79a.

The court first held that the admission of a videotape recording of co-defendant Briseno's state court testimony did not violate the Confrontation Clause because petitioners had an adequate opportunity to cross-examine Briseno at the state court trial. Pet. App. 4a-9a. The court rejected petitioners' contention that they lacked such an opportunity because they did not have access to enhancements to the Holliday videotape. *Id.* at 7a-8a. The court explained that petitioners' "failure to take full advantage of their opportunity to cross-examine in the first trial—by developing those tools earlier—cannot alter the fact that they *had* the opportunity." *Id.* at 8a.

The court also rejected petitioners' contention that Briseno's testimony was tainted because he was exposed to compelled statements made by petitioners to the LAPD Internal Affairs Division. Pet. App. 14a-20a. The court held that the government's burden under *Kastigar* v. *United States*, 406 U.S. 441 (1972), was to show that "each matter as to which the witness will testify is derived from a source independent of the immunized testimony." Pet. App. 15a-16a. The court held that the government had satisfied that burden by showing that Briseno was an eyewitness to the events. *Id.* at 20a. The court also noted that Briseno had access to numerous other legitimate sources to refresh his testimony, including the Holliday videotape and petitioners' own state court testimony. *Ibid.*

The court next held that the successive state and federal prosecutions of petitioners did not violate the Double Jeopardy Clause. Pet. App. 30a-32a. The court noted that this Court has held that the Double Jeopardy Clause permits successive prosecutions of

the same conduct by different sovereigns. *Id.* at 30a. While the Ninth Circuit recognizes an exception to the dual sovereignty rule where the second prosecution is a "sham" pursued on behalf of the first sovereign, the court found no evidence of such a "sham" in this case. *Id.* at 30a-32a.

The court rejected petitioners' contention that certain remarks in the government's closing argument, to which they did not object at trial, constituted plain error. Pet. App. 40a-45a. The court found that only one of the challenged remarks was improper—an observation that the Holliday videotape had caused "horror and outrage" from "Paris to Tokyo." *Id.* at 44a. That remark, the court concluded, did not constitute plain error, because it was isolated, the jury was instructed to base its verdict only on the evidence, and there was substantial independent evidence to support the verdict. *Id.* at 44a-45a.

The court held that the jury was correctly instructed that Koon had a duty to intervene to protect King from an "unreasonable" use of force by other officers, not from force that was "intended as punishment" or "shocking to the conscience." Pet. App. 46a-51a. The court explained that "[b]ecause the third-party actors were officers attempting to make an arrest, Koon's Fourteenth Amendment duties to the custodial subject were to protect against * * * such force as was unreasonable." *Id.* at 50a. The court also held that the jury was correctly instructed that a person is in official custody when a reasonable person would have believed that he or she was not free to leave. *Id.* at 51a-52a. The court concluded that while that standard is derived from a Fourth Amendment case, "the same definition of 'custody' applies in the Fourteenth Amendment context." *Id.* at 51a.

The court further held that the jury had been properly instructed on the element of willfulness. Pet. App. 52a-54a. The court concluded that the instructions made clear that the government was required to show that petitioners acted with the specific intent to violate King's constitutional rights. *Ibid.*

Turning to the sentencing issues, the court first held that none of the factors considered by the district court in awarding a three-level departure was a permissible ground for a departure. Pet. App. 58a-69a. The court concluded that "[p]ersonal and professional consequences that stem from a criminal conviction are not appropriate grounds for departing" because "[t]hey are not tied to any penological purpose or legitimate sentencing concern expressed in the federal sentencing statutes." *Id.* at 62a. Any attempt to separate collateral consequences that should serve as a ground for a departure from those that should not, the court added, "would be boundless in the moral, social, and psychological examinations it required courts to make" and "can only lead to huge disparities in sentencing." *Id.* at 62a-63a. For similar reasons, the court rejected the view that a departure is permissible when a person's status makes him more susceptible to abuse in prison. *Id.* at 64a-66a. The court explained that the inquiry required by such a departure ground is both "subjective and open-ended" and "the number of defendants who might qualify * * * is virtually unlimited." *Ibid.* The court held that a departure because petitioners are unlikely to engage in future unlawful conduct was unwarranted since the lower limit of Criminal History Category I is set for an offender with the lowest risk of recidivism. *Id.* at 67a-68a. Finally, the court concluded that the "specter of unfairness" of dual

prosecutions was not a permissible departure ground "because it speaks neither to the culpability of the defendant, the severity of the offense, nor to some other legitimate sentencing concern." *Id.* at 68a-69a. The court added that recognizing such a departure ground in this case would undermine the Attorney General's determination that a distinct federal interest warranted a second prosecution. *Id.* at 69a.

The court also held that a five-level departure for victim misconduct was not justified because the district court found that King's misconduct provoked only the initial use of force, not petitioners' unlawful conduct. Pet. App. 70a-71a. The court further held that the volatility of the incident in conjunction with the initial provocation also did not furnish a ground for departure. *Id.* at 72a-73a. The court reasoned that such volatility is incorporated "into the basic fabric of the law in this area," and is therefore "typical—not unusual." *Id.* at 73a. The court noted that ordinary provocation can be a mitigating factor when assault is committed by a civilian. It held, however, that because the Guidelines treat assaults committed by public officials more seriously than assaults committed by civilians, only extreme provocation would justify a departure when the defendant is a public official. *Id.* at 76a & n.38.

The panel voted to deny rehearing, and the full court voted to deny the suggestion for rehearing en banc. Pet. App. 80a-81a. Judge Reinhardt, joined by eight other judges, would have granted rehearing en banc on the sentencing issues. *Id.* at 81a-93a.

ARGUMENT

1. Petitioners contend (Koon Pet. 12-18; Powell Pet. 32-41) that the court of appeals erred in failing to

defer to the district court's decision to depart downward from the sentencing range specified by the Sentencing Guidelines. That contention is without merit.

As the court of appeals concluded (Pet. App. 58a-69a), the factors relied upon by the district court to justify its three-level departure are not permissible grounds for a departure. In particular, the personal and professional consequences that stem from a criminal conviction are not appropriate grounds for departing because "[t]hey are not tied to any penological purpose or legitimate sentencing concern expressed in the federal sentencing statutes," and because permitting departures on those grounds "can only lead to huge sentencing disparities." *Id.* at 62a-63a. A departure based on the susceptibility of police officers to abuse in prison would be inconsistent with the purposes of the Guidelines because it provides "an unlimited open-ended rationale for departing," that would be equally available to gang members, police informants, and child abusers. *Id.* at 65a. A departure based on the unlikelihood of future criminal activity by petitioners is inconsistent with the Guidelines because the lower limit of Criminal History Category I already takes that factor into account. *Id.* at 67a-68a. And a departure based on the perceived unfairness of successive state and federal prosecutions conflicts with the purposes of the Guidelines because that ground "speaks neither to the culpability of the defendant, the severity of the offense, nor to some other legitimate sentencing concern" and because permitting a departure on that ground would undermine the Attorney General's determination that a distinct federal interest warrants a federal prosecution. *Id.* at 68a-69a.

The court of appeals was similarly correct in holding (Pet. App. 70a-76a) that a departure based on victim misconduct was unwarranted in this case. Guidelines § 5K2.10 limits departures based on the victim's misconduct to cases where the misconduct "contribute[s] significantly to provoking the offense behavior." Pet. App. 70a. The district court found that while King's misconduct provoked the initial use of force against King, it did not provoke petitioners' unlawful conduct. *Id.* at 70a-71a. Accordingly, the plain language of Section 5K2.10 does not support a departure based on victim misconduct. In addition, as the court of appeals concluded (Pet. App. 73a), provocation in a volatile arrest setting is a factor that is "built into the most fundamental structure of excessive force jurisprudence." See *Graham* v. *Connor*, 490 U.S. 386, 396-397 (1989) ("The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation."). For that reason, the excessive force Guidelines Section (§ 2H1.4) necessarily takes that factor into account in typical cases. Pet. App. 73a.

Petitioners contend (Koon Pet. 12; Powell Pet. 32) that the court of appeals' exercise of de novo review over the district court's departure decisions conflicts with the general approach for appellate review of departure decisions set forth in *United States* v. *Rivera*, 994 F.2d 942 (1st Cir. 1993). There is, however, no such conflict. In *Rivera*, the First Circuit held that plenary review is appropriate "where the question on review is simply whether or not the allegedly special circumstances (i.e., the reasons for

departure) are of the 'kind' that the Guidelines, *in principle*, permit the sentencing court to consider at all." 944 F.2d at 951. The court also held that plenary review is appropriate where the appellate court performs the "quintessentially legal" function of interpreting the Guidelines in light of their "intention and purpose." *Ibid.* In contrast, the court held that, because a district court is better situated to determine whether the particular circumstances of a case make it unusual, an appellate court must ordinarily defer to such fact-based judgments. *Id.* at 951-952.

The court's exercise of de novo review in this case is consistent with the approach outlined in *Rivera*. As discussed above, the court rejected the district court's three-level departure because it concluded that the factors relied upon by the district court to support that departure are not of the kind that the Guidelines permit a sentencing court to consider at all. And the court rejected the five-level departure for victim misconduct on the basis of its interpretation of the victim misconduct and excessive force Guidelines Sections. Those are the kind of legal determinations that *Rivera* holds are subject to de novo review. To the extent that petitioner seeks review "concerning the appropriate factors to be considered by a district court in determining whether to depart from the Sentencing Guidelines" (Pet. 12), that issue may be resolved by the Sentencing Commission. See *Braxton* v. *United States*, 500 U.S. 344, 348-349 (1990). It does not warrant review by this Court.

Petitioners also err in contending (Koon Pet. 17; Powell Pet. 39) that the court's decision on the victim misconduct departure conflicts with *United States* v. *Yellow Earrings*, 891 F.2d 650 (8th Cir. 1989). In that case, the defendant was a woman who stabbed a larger

intoxicated man after he had pushed her, verbally abused her, and publicly humiliated her because she refused to have sex with him. *Id.* at 651. On those facts, the Eighth Circuit held that a departure for victim misconduct was warranted. Unlike the situation here, the district court in *Yellow Earrings* found that the victim's misconduct did not merely precede the defendant's unlawful conduct, but actually provoked it. *Id.* at 652-654. Moreover, the defendant in *Yellow Earrings* was a civilian. That case therefore did not raise any question concerning the circumstances under which victim misconduct should be viewed as a mitigating factor in cases involving the use of excessive force by police officers. For those reasons, *Yellow Earrings* is inapposite here.

2. Koon argues (Koon Pet. 18-21) that the court of appeals applied the wrong standard in deciding that co-defendant Briseno's videotaped state court testimony was not tainted by his exposure to compelled statements that petitioners gave to the Internal Affairs Division of the LAPD. Briseno had obtained those statements because he was facing disciplinary proceedings and he had a right under state law to discovery of all evidence relevant to that proceeding. Pet. App. 20a n.14. Koon's argument is without merit.

a. In *Kastigar* v. *United States*, 406 U.S. 441 (1972), the Court held that the Self-Incrimination Clause of the Fifth Amendment precludes the government from using compelled statements or evidence derived from them in a federal criminal trial. Under *Garrity* v. *New Jersey*, 385 U.S. 493 (1967), that protection extends to public employees, such as petitioners, who give statements under a threat of removal from office. Once a defendant demonstrates that he has given a compelled statement, *Kastigar* requires prosecuting

authorities to demonstrate that "their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence." 406 U.S. at 460.

The standard applied by the court of appeals in deciding that Briseno's testimony was not tainted by his exposure to petitioners' compelled statements is identical to the standard set forth in *Kastigar*. Pet. App. 17a. The court of appeals held that "the prosecution meets its Fifth Amendment burden of proving that compelled testimony is not used against a defendant when it produces a legitimate, wholly independent source for all matters as to which the witness will testify." *Ibid.* As the court stated, that standard "was taken directly from the language in *Kastigar*." *Ibid.*

Applying the independent source standard derived from *Kastigar*, the court correctly concluded that Briseno's testimony was not tainted. As the court explained, "Briseno was an eyewitness to the events at issue in the trial and thus had independent personal knowledge of the events to which he testified." Pet. App. 20a.

b. Koon contends (Pet. 19) that review in this case is warranted because the standard applied by the court of appeals for showing the absence of witness taint conflicts with the standard adopted by the D.C. Circuit in *United States* v. *North*, 910 F.2d 843 (*North I*), modified, 920 F.2d 940 (1990) (*North II*), cert. denied, 500 U.S. 941 (1991), and *United States* v. *Poindexter*, 951 F.2d 369 (1991), cert. denied, 113 S. Ct. 656 (1992). In those cases, the D.C. Circuit held that the government must show not only that there is an independent source for the testimony of a witness exposed to compelled statements, but also that the

witness has not shaped or altered his testimony in any way, as a result of that exposure. *North II*, 920 F.2d at 942; *North I*, 910 F.2d at 860, 872-873. That rule applies even when, as here, prosecuting authorities play no role in exposing the witness to the compelled statements. *North II*, 920 F.2d at 942, 944-945. As one court has stated, the D.C. Circuit's standard constitutes "the most expansive reading of the Fifth Amendment to date regarding the evidentiary use of immunized testimony." *United States* v. *Helmsley*, 941 F.2d 71, 82 (2d Cir. 1991), cert. denied, 502 U.S. 1091 (1992).

For several reasons, the conflict claimed by petitioners does not warrant this Court's review. First, in this case, petitioners testified in the state court trial before Briseno testified, and the content of their testimony was substantially the same as the content of their compelled statements. Pet. App. 20a; Gov't C.A. Br. 24 & Addendum. Nothing in the D.C. Circuit decisions suggests that it would apply its standard in such circumstances. To the contrary, the D.C. Circuit implied in *North II* that its rule would not apply when a defendant voluntarily testifies to events he has previously discussed under compulsion. 920 F.2d at 946 n.7. Second, in this case, the district court applied the D.C. Circuit's standard and found that Briseno's testimony was not affected in any way by his exposure to petitioners' compelled statements. Gov't C.A. Br. 17-18, 22-24. Because petitioners cannot benefit from an application of the D.C. Circuit standard, this is not a suitable case for deciding whether that standard is the proper one.

Finally, *North* and *Poindexter* both involved immunity conferred by federal statute, while the present case involves so-called *Garrity* immunity.

The D.C. Circuit has not yet had occasion to decide whether its standard should be extended to the *Garrity* context. As the court of appeals in this case noted, if the D.C. Circuit standard were applied in the *Garrity* context, "police officers could protect each other by compelling testimony and disseminating it widely, placing any criminal prosecution at serious risk and possibly barring prosecution altogether." Pet. App. 19a n.13. The conflict asserted by petitioners therefore does not warrant review in this case.[2]

3. Koon contends (Koon Pet. 22-24) that the district court improperly instructed the jury on the meaning of "unlawful force" and "custody" in connection with the count charging him with depriving King of his Fourteenth Amendment right to be kept free from harm while in official custody. That contention is without merit.

a. In *Logan* v. *United States*, 144 U.S. 263, 284 (1892), this Court held that a person taken into custody has a constitutional right to be protected "against assault or injury from any quarter." More recently, in *DeShaney* v. *Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 199-200 (1989), the Court explained that "when the State takes a person into its custody and holds him there against his will, the

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[2] The other circuit court decisions cited by Koon (Pet. 20) are inapposite. *United States* v. *Bartel*, 19 F.3d 1105, 1109-1114 (6th Cir.), cert. denied, 115 S. Ct. 113 (1994), involved the question of what showing the government must make to establish that a grand jury indictment has not been tainted by the grand jury's exposure to compelled statements. *United States* v. *Schmidgall*, 25 F.3d 1523, 1529-1532 (11th Cir. 1994), involved the question of what showing the government must make to establish that government agents have not themselves used compelled statements to shape a witness's testimony.

Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." Thus, as the court of appeals held (Pet. App. 46a), once King was in custody, Koon had a duty under the Fourteenth Amendment to protect King from the use of unlawful force by others, including other officers under his command. *United States* v. *Reese*, 2 F.3d 870, 887-890 (9th Cir. 1993), cert. denied, 114 S. Ct. 928 (1994); *United States* v. *McKenzie*, 768 F.2d 602, 604 (5th Cir. 1985), cert. denied, 474 U.S. 1086 (1986); *Lynch* v. *United States*, 189 F.2d 476, 478 (5th Cir.), cert. denied, 342 U.S. 831 (1951).

Koon contends (Pet. 22-24) that the district court erred in defining the unlawful force from which King had a right to be protected as "unreasonable" force, rather than as force that "amounts to punishment" or that "shocks the conscience." The court's definition was correct, however, because King was subjected to force applied by police officers during an arrest. Under *Graham* v. *Connor*, 490 U.S. 386, 395-397 (1989), the use of force during an arrest is unlawful if it is objectively unreasonable. Koon therefore had a duty to protect King from the use of unreasonable force by the officers under his command.

Koon errs in contending (Koon Pet. 22-23) that the court's decision conflicts with *United States* v. *Cobb*, 905 F.2d 784 (4th Cir. 1990), cert. denied, 498 U.S. 1049 (1991). In that case, the court of appeals held that the Fourteenth Amendment protects a *pretrial detainee* against the use of excessive force that amounts to punishment. 905 F.2d at 788. The court expressly recognized that an arrestee, such as the victim in this case, is protected against the use of unreasonable force. *Id.* at 788 n.7; see also *Graham*, 490 U.S. at 394-395 & n.10 (while arrestees are protected against the use of unreasonable force, pretrial detainees may only be protected against the use of force that amounts to punishment).

b. Koon's contention (Pet. 23-24) that the jury was improperly instructed on the meaning of custody is similarly without merit. The jury was instructed that a person is in official custody if "a reasonable person in that situation would have believed he or she was not free to leave." Pet. App. 51a. That instruction was drawn directly from this Court's decision in *United States* v. *Mendenhall*, 446 U.S. 544, 554 (1980). And while *Mendenhall* was a Fourth Amendment case, there is no reason that custody should be defined differently in the Fourteenth Amendment context. See *DeShaney*, 489 U.S. at 199-200 (Fourteenth Amendment right to be free from harm arises when state officials impose a limitation on a person's "freedom to act on his own behalf").

4. Koon contends (Pet. 24-30) that successive state and federal prosecutions of him for the same conduct violated the Double Jeopardy Clause. As Koon recognizes, however, this Court has repeatedly held that "the Constitution does not prohibit successive prosecutions by different sovereigns based on the same conduct." *Department of Revenue* v. *Kurth Ranch*, 114 S. Ct. 1937, 1947-1948 n. 22 (1994); see *Heath* v. *Alabama*, 474 U.S. 82 (1985); *Abbate* v. *United States*, 359 U.S. 187 (1959); *Bartkus* v. *Illinois*, 359 U.S. 121 (1959); *United States* v. *Lanza*, 260 U.S. 377 (1922).

Koon contends (Pet. 27-28) that the dual sovereignty doctrine should be reexamined because it is inconsistent with the text and history of the Double Jeopardy Clause. This Court, however, has carefully considered those contentions before and soundly rejected them. The Double Jeopardy Clause provides

that no person shall be twice put in jeopardy for the "same offence." In using the term "same offence," the Framers incorporated the common law conception of crime as an offense against the sovereignty of the government. *Heath*, 474 U.S. at 88. Accordingly, "[w]hen a defendant in a single act violates the 'peace and dignity' of two sovereigns by breaking the laws of each, he has committed two distinct 'offences'." *Ibid.* The Court "has always understood the words of the Double Jeopardy Clause to reflect this fundamental principle." *Id.* at 93.

Moreover, if the Double Jeopardy Clause were not interpreted in that way, "undesirable consequences would follow." *Abbate*, 359 U.S. at 195. As the Court has explained, "if the States are free to prosecute criminal acts violating their laws, and the resultant state prosecutions bar federal prosecutions based on the same acts, federal law enforcement must necessarily be hindered." *Ibid.* At the same time, "no one would suggest that, in order to maintain the effectiveness of federal law enforcement, it is desirable completely to displace state power to prosecute crimes based on acts which might also violate federal law." *Ibid.* Thus, the dual sovereignty doctrine "is not simply a fiction that can be disregarded in difficult cases. It finds weighty support in the historical understanding and political realities of the States' role in the federal system and in the words of the Double Jeopardy Clause itself." *Heath*, 474 U.S. at 92. Koon's contention that the doctrine should be reconsidered is without merit.[3]

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[3] Contrary to petitioner's view (Pet. 29), there is no "potential exception" to the dual sovereignty doctrine for cases in which a federal prosecution follows a state acquittal, rather than a state guilty verdict. As discussed above, the dual sovereignty doctrine rests on the view that state and federal prosecutions for the same conduct are not prosecutions for "the same offence" within the meaning of the Double Jeopardy Clause. It is therefore irrelevant whether the initial state prosecution results in a guilty verdict or an acquittal.

5. Powell argues (Pet. 10-18) that a government attorney's statement in closing argument that the Holliday videotape had caused "horror and outrage" from "Paris to Tokyo" impaired his right to a fair trial. Petitioner did not object to those remarks at trial, however. Pet. App. 40a. The court of appeals therefore examined the remarks under a plain error standard. *Ibid.* Finding that the remarks did not materially prejudice the outcome of the trial, the court concluded that they did not constitute plain error. *Id.* at 43a-45a.

In challenging the court of appeals' conclusion, Powell does not suggest that the court applied the wrong legal standard for assessing plain error. Instead, he argues only that the court came to the wrong conclusion based on the facts of this case. That fact-bound contention raises no issue of general importance and therefore does not warrant this Court's review.

In any event, the court of appeals correctly concluded that the remarks did not constitute plain error. As the court of appeals explained (Pet. App. 44a-45a), the improper remarks consisted of "a few sentences from a trial that lasted over a month and from detailed closing arguments that lasted many hours"; government counsel, defense counsel, and the district court all "admonished the jurors to base their verdict only on the evidence before them"; there was

"substantial independent evidence to support a finding of guilt"; and the acquittal of two of the defendants indicated that the jury was able to weigh the evidence "without prejudice." In those circumstances, the remarks did not materially affect the jury's ability to decide the case on the basis of the evidence before it.[4]

6. Powell argues (Pet. 18-22) that the admission of Briseno's videotaped state court testimony violated his rights under the Confrontation Clause. That argument is without merit.

Federal Rule of Evidence 804(b) permits the introduction of prior testimony if the party against whom the testimony is offered "had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." Because Rule 804(b) embodies a firmly rooted exception to the hearsay rule (see *Mattox* v. *United States*, 156 U.S. 237 (1895)), if testimony is admissible under that Rule, its admission is consistent with the Confrontation Clause. *Bourjaily* v. *United States*, 483 U.S. 171, 182-183 (1987).

As the court of appeals concluded (Pet. App. 5a-9a), Briseno's state court testimony was admissible under Rule 804(b). The state court did not interfere in any way with petitioners' ability to cross-examine Briseno, and since the issues in that trial were substantially similar to the issues in this case, petitioners had a similar motive to develop Briseno's testimony. *Id.* at 7a-9a.

[4] Powell asserts (Pet. 11, 15-18) that several other remarks made by government counsel were improper. As the court of appeals concluded, however, each of those remarks was properly designed to persuade the jury that petitioners' conduct was unreasonable, and that the jury was the ultimate arbiter of that issue. Pet. App. 40a-42a.

Powell contends (Pet. 18 & n.27) that he did not have an adequate opportunity to cross-examine Briseno at the state trial because he did not have access to enhancements to the Holliday video tape that might have made his cross-examination of Briseno more effective. Those enhancements, Powell points out, were not developed until after the state court trial. *Ibid.* But as the court of appeals explained (Pet. App. 8a), petitioners' "failure to take full advantage of their opportunity to cross-examine in the first trial—by developing [the enhancements] earlier—cannot alter the fact that they *had* the opportunity." The admission of Briseno's state court testimony therefore did not violate the Confrontation Clause.

7. Finally, Powell argues (Pet. 22-32) that the court of appeals erred in approving the district court's jury instructions on the definition of willfulness. In Powell's view (Pet. 24-25), the instructions were improper because they permitted the jury to convict on the basis of acts that were merely volitional rather than on the basis of acts undertaken with the specific intent of violating King's rights to be free from unreasonable force. See *Screws* v. *United States*, 325 U.S. 91, 107 (1945) (to act willfully under 18 U.S.C. 242, the defendant must have had "the purpose to deprive the [victim] of a constitutional right").

The jury was specifically instructed that "an act is done willfully if it is done voluntarily and intentionally, *and* with a specific intent to do something th[e] law forbids; that is, with an intent to violate a protected right." Pet. App. 52a (emphasis added). The jury was further instructed that "the required specific intent is the intent to use more force than is

reasonable under all of the circumstances," *ibid.*, and that the defendant must have "intended to accomplish that which the Constitution forbids." *Id.* at 53a. Those instructions clearly informed the jury that to satisfy the willfulness element the government was required to show not only that Powell intended to use force, but also that he intended for the force to be unreasonable. Accordingly, the court of appeals correctly rejected the claim that the instructions "allow[ed] the jury to convict on the basis of acts which were merely volitional, rather than undertaken with the specific intent to violate King's rights," *ibid.*, and that holding warrants no further review.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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No. 94-1664

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

STACEY C. KOON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY MEMORANDUM

Petitioner Stacey C. Koon respectfully files this memorandum in reply to the United States' brief in opposition to certiorari.

1. Question 1 -- The Standard of Review for Sentencing Guidelines Departures.

The United States asserts that "[t]here is . . . no . . . conflict" (Opp. at 11) between the Ninth Circuit's decision in this case concerning the appropriate standard of appellate review of a district court's departure from the Sentencing Guidelines and the First Circuit's decision in *United States v. Rivera*, 994 F.2d 942 (1st Cir. 1993). But nine of the judges of the court below concluded exactly the opposite, explaining that the First Circuit's "approach in *Rivera* is squarely at odds with the inflexible and far stricter approach adopted by the panel in this case." Pet. App. 90a (dissent from denial of rehearing *en banc*); *see also* Pet. 12-18; Br. *Amicus Curiae* of the Law Enforcement Legal Defense Fund 2-17; Br. *Amicus Curiae* of Nat'l Ass'n of Criminal Defense Lawyers 2-6.

The conflict among the circuits that is invisible to the United States could not be clearer: whereas the court below held that a district court's departure decision is to be reviewed *de novo*, Pet. App. 57a, the First Circuit held in *Rivera* that appellate courts must defer to a district court's decision to depart unless the

district court relied upon factors that are explicitly forbidden or discouraged by the Sentencing Guidelines. None of the factors considered by the district court here were either forbidden or discouraged, and one -- the victim's misconduct -- is actually *encouraged* by the Guidelines. Application of the *Rivera* approach to this case therefore would have precluded *de novo* review and instead required deference to the district court's discretionary judgments.

The United States offers a misleading excerpt from *Rivera* to support its claim that *Rivera* does not conflict with the decision below, arguing that all of the Ninth Circuit's sentencing rulings were "the kind of legal determinations that *Rivera* holds are subject to *de novo* review." Opp. at 11. According to the government, "[i]n *Rivera*, the First Circuit held that plenary review is appropriate 'where the question on review is simply whether or not the allegedly special circumstances (*i.e.*, the reasons for the departure) are of the "kind" that the Guidelines, *in principle*, permit the sentencing court to consider at all'." Opp. at 10-11 (quoting *Rivera*, 994 F.2d at 951). The United States contends that this sentence from *Rivera* means that courts of appeals have broad and plenary authority to create new, impermissible grounds for departure from the Guidelines, even if such factors have not been delineated in the Sentencing Guidelines. However, the remainder of the paragraph from which the government draws this inference makes it clear that the *Rivera* court was referring *only* to factors that are explicitly forbidden or discouraged by the Guidelines:

> [D]epartures for some reasons are "forbidden," and departures for certain other reasons are "discouraged" unless the case is out of the ordinary. Were a district court (1) to try to depart for a "forbidden" reason, or were it (2) to try to depart for a "discouraged" reason *without recognizing that it must explain how the case (compared to other cases where the reason is present) is special,* its departure would not be lawful. The district court has no special expertise in deciding whether a factor is "forbidden" or "discouraged." Hence, there is no reason to review such a decision with any "leeway" or "deference."

994 F.2d at 951 (citations omitted).

None of the "extraordinary factors" (Pet. App. 131a) considered by the district court here in making its 3-level downward departure were expressly "forbidden" or "discouraged," as those terms were defined in *Rivera*. Thus, the Ninth Circuit's *de novo* review of that departure flatly conflicts with *Rivera* and paves the way for highly inconsistent standards for the review of sentencing decisions in the federal courts.

With respect to the district court's 5-level departure for "victim misconduct," that factor is actually expressly *encouraged* by the Sentencing Guidelines, and there is no dispute that there was victim misconduct in this case within the meaning of the Guidelines. Among other things, Mr. King "resisted and evaded arrest, persistently failed to comply with police commands" and "attempted to escape." Pet.

App. 122a. The district court therefore found as a matter of fact that "Mr. King's wrongful conduct contributed significantly to provoking the offense behavior." Pet. App. 121a. Indeed, the district court specifically found that the "incident . . . would not have occurred at all, but for Mr. King's initial misconduct," and that his wrongdoing therefore played a "substantial role . . . in bringing about the defendants' unlawful conduct," removing this case from the "heartland" of offenses contemplated by the pertinent guidelines relating to excessive force. Pet. App. 123a-124a.

Although the court of appeals overrode the district court's finding that the facts of this case made it so unusual as to justify a downward departure for victim misconduct, it acknowledged that other facts -- "for example, where the victim kills or wounds the officer's partner in his presence" -- might remove an excessive force case from the "heartland" and provide the basis for a victim misconduct departure. Pet. App. 76a n.38. Thus, the Ninth Circuit's review of the victim misconduct departure was not "quintessentially legal," as that term was used by *Rivera;* if anything, it was quintessentially factual, *see* Pet. App. 88a (dissent from the denial of rehearing *en banc*) ("the panel's treatment of the five-point departure is dictated less by the language or spirit of the Guidelines than by hostility to Judge Davies' decision to depart"), as is the government's effort to distinguish *United States* v. *Yellow Earrings*, 891 F.2d 650 (8th Cir. 1989). Under *Rivera*, the district court's "determinations of whether (and the extent to which) given circumstances make a case 'unusual' or 'not ordinary'" were entitled to

deference and "respect," not subject to plenary review. 994 F.2d at 952. And the Eighth Circuit insists that appellate courts should "accord great deference" to such departure decisions. *Yellow Earrings*, 891 F.2d at 654-55.

The Ninth Circuit's *de novo* review standard here is inconsistent with the limited role of appellate courts under the Sentencing Guidelines, *see Williams* v. *United States*, 112 S. Ct. 1112, 1121 (1992), and sharpens a conflict among the circuits concerning the constantly recurring question of the proper standard for appellate review of sentencing departures. Review by this Court is therefore necessary and appropriate.

2. Question 2 -- The Requirements Under *Kastigar*.

The United States cannot and does not dispute that the decision below is in direct conflict with *United States* v. *North* ("*North I*"), 910 F.2d 843, *modified*, ("*North II*"), 920 F.2d 940 (D.C. Cir. 1990), *cert. denied*, 500 U.S. 941 (1991), and *United States* v. *Poindexter*, 951 F.2d 369 (D.C. Cir. 1991), *cert. denied*, 113 S. Ct. 656 (1992), regarding the specific requirements that the government must meet under *Kastigar* v. *United States*, 406 U.S. 441 (1972), in order to rely upon testimony from a witness who has been exposed to the defendant's coerced statement. Opp. at 13-15. The Ninth Circuit expressly rejected the D.C. Circuit's approach in *North* and *Poindexter*, Pet. App. 18a-19a & n.13, and this Court should grant review to resolve the conflict and clarify the proper Fifth Amendment standards under *Kastigar*.

The United States argues that this Court should not eliminate the conflict among the circuits on the *Kastigar* issue, but its reasoning is flawed. First, the United States focuses on the fact that Sergeant Koon voluntarily testified in the state court trial, where Officer Briseno gave his "highly damaging" (Pet. App. 4a) testimony after having been exposed to Sergeant Koon's compelled statement. Relying upon *dicta* in a footnote, the United States argues that "the D.C. Circuit implied in *North II* that its rule would not apply when a defendant voluntarily testifies to events he has previously discussed under compulsion." Opp. at 14. There is, however, a fundamental and insurmountable problem with this logic: the defendant in *North himself* voluntarily testified at his trial as to events he had previously discussed under compulsion before Congress. And the D.C. Circuit has never in any other case suggested that its *Kastigar* standard is rendered inapplicable where a defendant voluntarily testifies at trial but continues to object to the use of a previously given compelled statement.

Second, the United States argues that, because the district court purported to apply the D.C. Circuit standard in holding that Officer Briseno's testimony was admissible, Sergeant Koon "cannot benefit from an application of the D.C. Circuit standard" here. Opp. at 14. That argument is specious. The Ninth Circuit declined to address the question whether the district court's interpretation and application of the D.C. Circuit's standard were correct because it rejected the D.C. Circuit's standard and affirmed the district court's decision under the Ninth Circuit's far more lenient standard. Indeed, the court below clearly

perceived that the D.C. Circuit's standard would make a significant difference in this case, going to great lengths to distinguish its *Kastigar* requirements from those of the D.C. Circuit and pointedly to state that the rules laid down in *North* and *Poindexter* "are not the law of [the Ninth] circuit." *See* Pet. App. 18a; *id.* 17a-19a.

Finally, the United States argues that "*North* and *Poindexter* both involved immunity conferred by federal statute" and suggests that the rigorous Fifth Amendment standard developed in that context should not apply where police officers are compelled to give testimony pursuant to "so-called *Garrity* immunity." Opp. at 14. But this argument cannot be squared with *Garrity* itself, which teaches "that policemen, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights." *Garrity* v. *New Jersey*, 385 U.S. 493, 500 (1967). Even the Ninth Circuit rejected the notion that "the showing required under the Fifth Amendment varies depending on the situation in which the testimony was compelled. The Fifth Amendment protects defendants from the use of their compelled statements regardless of when or where the statements were taken." Pet. App. 19a n.13; *see also* Brief of *Amicus Curiae* National Association of Police Organizations, Inc. at 3-8.

3. Question 3 -- The Proper Fourteenth Amendment Standard in Excessive Force Cases.

Relying on *Graham* v. *Connor*, 490 U.S. 386, 395-97 (1989), the government contends that the jury was properly instructed that Sergeant Koon could be found

to have violated Mr. King's Fourteenth Amendment substantive due process based merely upon his failure "to protect [Mr.] King from the use of unreasonable force." Opp. at 16. *Graham*, however, involved a violation of the *Fourth Amendment*, not the Fourteenth Amendment. The "objective unreasonableness" standard articulated in *Graham* applies only in the Fourth Amendment context; indeed, the *Graham* Court itself recognized that a more stringent standard -- "excessive force that amounts to punishment," 490 U.S. at 395 n.10 -- was applicable in the substantive due process context.

—

The government nonetheless argues that the "objective unreasonableness" standard should govern substantive due process violations during arrests, and attempts to distinguish *United States* v. *Cobb*, 905 F.2d 784 (4th Cir. 1990), *cert. denied*, 498 U.S. 1049 (1991), on the grounds that the "shock[s] the conscience"/"intended as punishment" standard applied in that case was in the context of a pretrial detainee. The *Cobb* court, however, correctly understood *Graham* to mean that the source of the proper standard to be applied in an excessive force case is the constitutional provision relied upon by the government in prosecuting the defendant. *See* 905 F.2d at 788 ("We begin our analysis where we must, 'by identifying the specific constitutional right allegedly

infringed by the challenged application of force.'") (quoting *Graham*, 490 U.S. at 394).[1]

Here, as in *Cobb*, the government indicted and prosecuted Sergeant Koon *only* for violations of the Fourteenth Amendment and it is that constitutional provision -- not the Fourth Amendment -- that provides the proper standard for determining whether there was an excessive force violation.

4. Question 4 -- The Double Jeopardy and Due Process Implications of the Successive Prosecutions.

The government does not dispute that this case properly presents the question whether the federal prosecution of Sergeant Koon after his acquittal by a state court on substantially identical charges, violates either the Double Jeopardy Clause or the Due Process Clauses of the Fifth and Fourteenth Amendments. Extraordinary political pressure, resulting from four days of rioting and looting that resulted in fifty-three deaths, hundreds of injuries and destruction of more than $1 billion in property, including over 5,000 buildings -- led to the federal prosecution of Sergeant Koon following his acquittal in state court. "The state of California vigorously prosecuted Koon . . . , and

---

[1] "The validity of the claim must . . . be judged by reference to the specific constitutional standard which governs that right, rather than to some generalized 'excessive force' standard." *Graham*, 490 U.S. 394.

lost." Pet. App. 130a. The United States then prosecuted him for "[t]he same underlying conduct." *Id.* The second jury heard the evidence and deliberated with the fullest and most immediate knowledge that massive rioting and looting were the direct consequences of the first acquittal and were the likely consequences of a second one. This case illustrates how vital the constitutional protections against multiple prosecutions are to unpopular defendants.

CONCLUSION

For the foregoing reasons, and those set forth in the Petition, the Court should grant certiorari and set this case for plenary consideration.

June 26, 1995

Respectfully submitted,

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(9) (4)

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Nos. 94-1664 , 94-8842

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

STACEY C. KOON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

LAURENCE M. POWELL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT APPENDIX

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Petition for Writ of Certiorari Filed April 17, 1995
Certiorari Granted September 27, 1995

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* The opinions and orders of the District Court and the Court of Appeals relevant to the proceedings in this Court are printed in the appendix to each of the petitions for writ of certiorari and therefore have not been reproduced herein.

RELEVANT DOCKET ENTRIES FROM THE PROCEEDINGS IN THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

8/4/92	1	INDICTMENT counts filed against Stacey C. Koon (1) count(s) 2, Laurence M. Powell (2) count(s) 1, Timothy E. Wind (3) count(s) 1, Theodore J. Briseno (4) count(s) 1 filed by AUSA Steven Clymer (cshl) [Entry date 08/07/92]
2/16/93	268	MINUTES: J/T 1st day. Voir dire exam of prospective jury pool commenced. Furth jury selection is cont to 2/2/93 [sic] at 8:30 am. C/R: Beverly Casares by Judge John G. Davies (mc) [Entry date 03/03/93]
2/25/93	274	MINUTES: J/T 8th day. Opening stmts made by govt and dfts 1, 2, and 4. [Entry date 3/3/93]
4/10/93	330	MINUTES: 39th day of jury trial cont to 4/11/93 at 12:00 p.m. Closeing [sic] argu made. Crt instru jury. Baliff/matron sworn. Closeing [sic] argu were made by atty Mr. Braun on behalf of dft Briseno, and rebuttal argu were made by govt's cnsl. C/R: B. Casares and C. Lee by Judge John G. Davies (dj) [Entry date 4/16/93]
4/17/93	342	VERDICT as to Stacey C Koon (dj) [Entry date 4/22/93]

4/17/93	343	VERDICT as to Laurence M. Powell (dj) [Entry date 4/22/93]
7/9/93	391	SENTENCING memorandum re Stacey C. Koon, Laurence M. Powell, plaintiff USA (dj) [Entry date 07/09/93]
7/29/93	402	ntc of filing under seal as to dft Laurence M. Powel (lj) [Entry date 08/03/93]l
7/30/93	405	Suppl sent memo subm on behalf of dft Stacey C. Koon (dj) [Entry date 08/03/93]
8/3/93	407	Ntc of under seal filing of reply to dft Koon's sent memo, plaintiff AUSA (dj) [Entry date 08/04/93]
8/4/93	408	Govt's notice of under seal filing of reply to dft Powell's sent memo

8/4/93	412	SENTENCING memorandum re Stacey C. Koon, Laurence M. Powell, Timothy E. Wind, Theodore J. Briseno (dj) [Entry date 08/05/93]
8/4/93	413	MINUTES: Sentencing hearing held, sentencing Stacey C. Koon (1) count(s) 2. It is the jdgmnt of the crt that the dft is h/b comm to the cust of BOP to be impris for a term of 30 mos on ct 2. Upon rel frm impris, the dft shall be plcd on supv rel for a term of 2 yrs under the fol terms and cond: 1. the dft shall comply w/the r & r of the PO and GO 318. Purs to sect 5E1.2(f) of the gudelines, all fines are wvd, incl the costs of impris and supv, as it is found that such sanc would plc an undue burden on the dft's dpts. Full rest has not been ord in view of the dft's limited assets and the fin need of dpts. It is fur ord that the dft shall pay to the U.S. a s/a of $50.00 prior to his self surr date. It is fur ord that the dft shall surr himself to the instit desig by the BOP on or befre noon, 9/27/93. In the absence of such designation, the dft shall report to the USM at 312 N. Spring, LA, CA on or before the same date and time. Ruling (s): the crt denied the dft's mot for bond pending appl. C/R: Beverly Casares by Judge John G. Davies (dj) [Entry date 08/06/93]

8/5/93	414	JUDGMENT and Committment as to dft Stacey C. Koon issued to US Marshall Judge John G. Davies. entered 8/6/93 (dj) [Entry date 8/6/93]
8/4/93	415	MINUTES: Sentencing hearing held, sentencing Laurence M. Powell (2) count(s) 1. It is the jdgmnt of the crt that the dft is h/b comm to the cust of BOP to be impris for a term of 30 mos on ct 1. Upon rel frm impris, the dft shall be plcd on supv rel for a term of 2 yrs under the fol terms and cond: 1. the dft shall comply w/the r & r of the PO and GO 318. Purs to sect 5E1.2(f) of the gudelines, all fines are wvd, incl the costs of impris and supv, as it is found that such sanc would plc an undue burden on the dft's dpts. Full rest has not been ord in view of the dft's limited assets and the fin need of dpts. It is fur ord that the dft shall pay to the U.S. a s/a of $50.00 prior to his self surr date. It is fur ord that the dft shall surr himself to the instit desig by the BOP on or befre noon, 9/27/93. In the absence of such designation, the dft shall report to the USM at 312 N. Spring, LA, CA on or before the same date and time. Ruling (s): the crt denied the dft's mot for bond pending appl. C/R: Beverly Casares by Judge John G. Davies (dj) [Entry date 08/06/93]

8/4/93	416	JUDGMENT and Committment as to dft Laurence M. Powell issued to US Marshall Judge John G. Davies. entered 8/6/93 (dj) [Entry date 8/6/93]
8/4/93	417	Dft Stacey C. Koon sent exh A (dj) [Entry date 8/6/93]
8/27/93	426	NOTICE of Cross-Appeal to 9th Circuit Court of Appeals by plaintiff USA as to defendant Stacey C. Koon [413-3] frm sentence only (18 USC 3742). Sent imposed: 30 mos impris and 2 yrs supvn rel. Bail status: Dft to surr on 9/27/93; mot for bail pend in 9th Cir. Ent in this actn on 8/6/93. (cc: all counsel) Fee Status: Bill-waived. Frms Gvn. TDO. (lj) [Entry date 08/30/93]
08/27/93	427	NOTICE of Cross-Appeal to 9th Circuit Court of Appeals by plaintiff USA as to defendant Laurence M. Powell, [415-3] frm sentence only (18 USC 3742). Sent imposed: 30 mos impris and 2 yrs supvn rel. Bail status: Dft to surr on 9/27/93; mot for bail pend in 9th Cir. Ent in this actn on 8/6/93. (cc: all counsel) Fee Status: Bill-waived. Frms Gvn. TDO. (lj) [Entry date 08/30/93]

RELEVANT DOCKET ENTRIES FROM THE PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

8/30/93	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL
12/10/93	Filed original and 15 copies Stacey C. Koon first brief on cross-appeal, 34 pages and excerpts of record; served on 12/9/93 [93-50608, 93-50561] (ec) [93-50561 93-50608]
12/14/93	Filed Original and 15 copies Laurence M. Powell in 93-50562, in 93-50609 first brief on cross appeal, of 35 pages and excerpts of record in 3-vols; served on 12/10/93 [93-50562, 93-50609] (ec) [93-50562, 93-50609]
1/24/94	Received original and 15 copies USA 2nd cross-appeal brief, 83 pages; exerpts of record; I & II; Transcrips of Exhibits 91 & 92 (1-vol); Presentence Report; Govt's Suppl. Sealed Excerpts of Record (1-vol); served 1/20/94 deficient: ovsz. [93-50561, 93-50562, 93-50608, 93-50609](ec) [93-50561 93-50562 93-50608 93-50609]
1/24/94	Filed USA motion to file oversized consolidated brief and late brief (promo) [93-50561, 93-50562, 93-50608, 93-50609] served on 1/20/94 [2503405] (ec) [93-50561 93-50562 93-50608 93-50609]

1/24/94	Filed USA motion to file Transcript of Exhibits 91 and 92...and suppl. Excerpts under seal (promo) [93-50561, 93-50562, 93-50608, 93-50609] served on 1/20/94 [2503405] (ec) [93-50561 93-50562 93-50608 93-50609]
2/15/94	Filed order (Joseph T. SNEED,): the Govt's motion for Leave to file oversized second brief on cross-appeal is granted; the clk shall file the oversized late second brief. The government's motion for Leave to file the transcript of Exhibits 91 and 92 is denied. The transcripts of Exhibits 91 and 92 shall be lodged for such consideration as the panel that considers the merits of the case deems appropriate. The government's motion for leave to file vol. V of the suppl. excerpts of record under seal is granted. The clk shall place vol. V of the suppl. excerpts of record under seal. The videotapes (Exhibits 91 and 92) filed with the government's suppl. excerpts of record shall be returned. The parties are referred to Rule 11-4.2. The briefing schedule set in the court's Oct 26, 1993 order continues to govern. [2503405-1] [2503411-1] in 93-50561, 93-50562, 93-50608, 93-50609 [93 50561, 93-50562, 93-50608, 93-50609 [93-50561, 93-50562, 93-50609] (ec) [93-50561 93-50562 93-50608 93-50609]
2/15/94	Filed original and 15 copies USA second brief on cross-appeal, 83 pages; excerpts of record 4-vols.; Presentence Report; and Vol. V suppl. excerts under seal, served on 1/20/94 [93-50561, 93-50562, 93-50608, 93-50609] (ec) [93-50561 93-50562 93-50608 93-50609]

2/15/94	Lodged Appellee's Transcripts of Exhibits 91 & 92 [93-50561, 93-50562, 93-50608, 93-50609] (ec) [93-50561 93-50562 93-50608 93-50609]
3/14/94	Filed Appellant Stacey C. Koon motion for permission to file oversized brief (panel) [93-50561, 93-50562, 93-50608, 93-50609] served on 3/11/94 [2533726] [93-50561, 93-50562, 93-50608, 93-50609] (ec) [93-50561 93-50562 93-50562 93-50608 93-93-50609]
3/17/94	Received orig. 15 copies Laurence M. Powell in 93-50562's reply brief (Informal: no) of 30 pages; served on 3/14/94 deficient brief is oversized mtn/panel. [93-50561, 93-50562, 93-50608, 93-50609] (wp) [93-50561 93-50562 93-50562 93-50608 93-93-50609]
3/17/94	Filed Appellant Laurence M. Powell's motion for leave to file an oversized reply brief. (PANEL) [93-50562, 93-50561, 93-50608, 93-50609] served on 3/14/94 [2536283] [93-50562, 93-50561, 93-50608, 93-50609] (wp) [93-50561 93-50562 93-50562 93-50608 93-93-50609]
3/30/94	Received orig. 15 copies USA reply brief. 12 pages; served on 3/28/94. (panel) [93-50561, 93-50562, 93-50608, 93-50609[(ec) [93-50561 93-50562 93-50608 93-50609]

4/5/94	Filed order (for the Court:Deputy Clerk: gb) appellant's motion for leave to file an oversized reply brief is granted. [93-50561, 93-50562, 93-50608, 93-50609] (ec) [93-50561 93-50562 93-50608 93-50609]
4/5/94	Filed original and 15 copies Stacey C. Koon reply brief, 28 pages; served on 3/11/94 (panel) [93-50561, 93-50562, 93-50608, 93-50609] (ec) [93-50561 93-50562 93-50608 93-50609]
4/5/94	Filed original and 15 copies Laurence M. Powell reply brief, 30 pages; served on 3/14/94 [93-50562, 93-50561, 93-50608, 93-50609] (wp) [93-50561 93-50562 93-50608 93-50609]
5/2/94	ARGUED AND SUBMITTED TO James R. BROWNING, Betty B. FLETCHER, James M. Fitzgerald [93-50561, 93-50562, 93-50608, 93-50609] (dr) [93-50561 93-50562 93-50608 93-50609]
8/19/94	FILED OPINION: AFFIRMED IN PART; VACATED IN PART AND REMANDED FOR RESENTING (Terminated on the Merits after Oral Hearing; Affirmed; Written, Signed, Published. James R. BROWNING; Betty B. FLETCHER, author; James M. Fitzgerald.) FILED AND ENTERED JUDGMENT. [93-50561, 93-50562, 93-50608, 93-50609] (ck) [93-50561 93-50562 93-50608 93-50609]

9/7/94	Filed motion and deputy clerk order (Deputy Clerk: sa) granting motion for extension of time to file petition for rehearing w/suggestion for rehearing en banc to aplts Stacey Koon and Laurence Powell to and including 9/16/94. (Motion recvd 9/2/94) [93-50561, 93-50562, 93-50608, 93-50609] (sa) [93-50561 93-50562 93-50608 93-50609]
9/14/94	[2643779] Filed original and 40 copies Appellant Stacey C. Koon petition for rehearing with suggestion for rehearing en banc 15 p.pages, served on 9/13/94 [93-50561, 93-50608] (panel; active judges) (ec) [93-50561 93-50562 93-50608 93-50609]
10/19/94	Filed order (Betty B. FLETCHER,): the US is directed to respond to the defendants' suggestions for rehearing en banc. The court is particularly interested in response to the sentencing issues. The response shall be limited to 20 pages and shall be filed on or before Nov 7, 1994. [93-50561, 93-50562, 93-50608, 93-50609] (ec) [93-50561 93-50562 93-50608 93-50609]
11/8/94	Filed Appellee USA consolidated response to defendants' petition for enbanc rehearing, 20 pages, [2643779-1] in 93-50561, 93-50562, 93-50608, 93-50609] (ec) [93-50561 93-50562 93-50608 93-50609]

1/12/95	Filed Order, Dissent and Concurrence FOR PUBLICATION (James R. BROWNING, Betty B. FLETCHER, James M. Fitzgerald,): All of the panel members have voted to deny the petitions for rehearing of both defendants. Judge Browning and Judge Fletcher have voted to reject the suggestions for rehearing en banc of both defendants and Judge Fitzgerald has so recommended. ...A judge of the court requested a vote as to whether to take the case en banc. A vote was taken. The request failed to secure the affirmative vote of a majority of the active non-recused members of the court. Judge Trott was recused. The petitions for rehearing of both defendants are denied and suggestion for rehearing en banc of both defendants are rejected. SR, cjj, dissenting, with whom HP, CEW, AK, JTN and MDH, cjj, join and with whom DFO, TGN and AK, cjj, join except as to part IV....(see order for complete text) [2643779-1] in 93-50561, 93-50608 [93-50561, 93-50562, 93-50608, 93-50609] (ec) [93-50561 93-50562 93-50608 93-50609]
2/2/95	Filed for Publication Order And Amended Dissent And Concurrence: (James R. BROWNING, Betty B. FLETCHER, James M. Fitzgerald): The dissent from the order denying rehearing en banc filed 1/12/95 is amended as follows...(For complete text see order) [93-50561, 93-50562, 93-50608, 93-50609] (gva) [93-50561 93-50562 93-50608 93-50609]
4/17/95	Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 94-1664 filed on 4/10/95. [93-50561] (ah) [93-50561]

4/19/95 Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 94-8842 filed on 4/12/95. [93-50562, 93-50561] (crw) [93-50561 93-50562]

10/3/95 Received notice from Supreme Court, petition for certiorari GRANTED on 9/27/95. Supreme Court No. 94-1664 (crw) [93-50561, 93-50562, 93-50608, 93-50609] (ec) [93-50561 93-50608]

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff. v. STACY C. KOON, LAURENCE M. POWELL TIMOTHY E. WIND, THEODORE J. BRISENO, Defendants.	CASE NO. 92-686-JGD VERDICT

We the Jury in the above-entitled cause, find the defendant

STACEY C. KOON

GUILTY as charged in Count two of the Indictment
(Guilty or Not Guilty)

DATED: April 16, 1993

AT LOS ANGELES, CALIFORNIA

483
FOREPERSON OF THE JURY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff. v. STACY C. KOON, LAURENCE M. POWELL TIMOTHY E. WIND, THEODORE J. BRISENO, Defendants.	CASE NO. 92-686-JGD VERDICT

We the Jury in the above-entitled cause, find the defendant

LAURENCE M. POWELL

GUILTY as charged in Count one of the Indictment
(Guilty or Not Guilty)

DATED: April 16, 1993

AT LOS ANGELES, CALIFORNIA

483
FOREPERSON OF THE JURY

Supreme Court, U.S.
FILED
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CLERK

(10)

No. 94-1664

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

STACEY C. KOON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTION PRESENTED

Whether a district court's downward departure from the prescribed range of the United States Sentencing Guidelines based upon factors not expressly prohibited as grounds for departure is to be reviewed under the de novo standard applied by the court below or under the deferential standard set forth in *United States* v. *Rivera*, 994 F.2d 942 (1st Cir. 1993), and other cases.

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings below were Stacey C. Koon, Laurence M. Powell, and the United States of America.

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No. 94-1664

In The
Supreme Court of the United States
October Term, 1995

Stacey C. Koon,
Petitioner,

v.

United States of America,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF FOR PETITIONER

OPINIONS BELOW

The court of appeals' opinion (Pet. App. 1a-79a) is reported at 34 F.3d 1416. The court of appeals' order denying the petition for rehearing and suggestion for rehearing *en banc* (Pet. App. 80a-81a) and the opinions of the nine judges dissenting therefrom (Pet. App. 81a-93a) are reported at 45 F.3d 1303. The sentencing memorandum of the district court (Pet. App. 94a-138a) is reported at 833 F. Supp. 769.

JURISDICTION

The court of appeals' decision and judgment were filed on August 19, 1994. The petition for rehearing and suggestion for rehearing *en banc* was denied on January 12, 1995. The petition for writ of certiorari was timely filed on April 10, 1995. The petition was granted on September 27, 1995. This Court has jurisdiction over this case pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND SENTENCING GUIDELINES PROVISIONS INVOLVED

This case principally involves the following statutes and United States Sentencing Guidelines ("U.S.S.G."), the pertinent portions of which are reprinted in the Appendix to this brief: 18 U.S.C. § 242; 28 U.S.C. § 991; 18 U.S.C. § 3553; 18 U.S.C. § 3742; U.S.S.G. Ch. 1, Pt. A intro. comment. (excerpts); U.S.S.G. § 2A2.2; U.S.S.G. § 2H1.4; U.S.S.G. § 5K2.0, p.s.; U.S.S.G. § 5K2.10, p.s.[1]

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[1] All citations to the Sentencing Guidelines are taken from the Guidelines Manual dated November 1, 1992—the Guidelines Manual in effect on the date of Sergeant Koon's sentencing. *See generally* U.S.S.G. § 1B1.11(a) ("The court shall use the Guidelines Manual in effect on the date that the defendant is sentenced.").

STATEMENT OF THE CASE

A. Statement Of The Facts[2]

1. Rodney King's Arrest

On the evening of March 2, 1991, Rodney Glen King met two male friends in a suburb of Los Angeles. Pet. App. 96a-97a. For several hours, Mr. King and his friends drank malt liquor in his wife's parked Hyundai automobile, after which they then decided to go for a ride, with Mr. King driving. *Id.* 97a.

Mr. King was "intoxicated while driving."[3] *Id.* 121a; *see also id.* 2a, 97a. He was proceeding along the 210 Freeway towards the San Fernando Valley, *id.* 2a, 97a, when California Highway Patrol ("CHP") Officers Melanie Singer and Tim Singer observed Mr. King's speeding vehicle and commenced in pursuit with red lights flashing and siren activated. *Id.* Officer Melanie Singer estimated that Mr. King's vehicle was traveling in excess of 100 m.p.h. *Id.*

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[2] The facts stated below are based on the findings of fact made by the district court in its sentencing memorandum. The district court's factual findings were affirmed by the court below and were not challenged on appeal by the United States.

[3] "[I]t is certain that Mr. King consumed more than 80 ounces." Pet. App. 97a.

Mr. King ignored the CHP cruiser pursuing him, and sped to an exit off the freeway. *Id.* 97a-98a.[4] The chase continued for eight miles on surface streets, with Mr. King driving in an erratic fashion, slowing down and obeying some traffic signals and speeding up and running red lights at others. *Id.*

Officer Melanie Singer called over her radio for assistance. *Id.* 2a, 97a. Los Angeles Police Department Officers Laurence M. Powell and Timothy E. Wind, along with patrol officers from the Los Angeles Unified School District, responded to the call and joined in pursuit of Mr. King's vehicle. *Id.* 2a, 97a. During the pursuit by the three vehicles, the CHP officers ordered Mr. King by loud-speaker to stop, but he refused to do so. *Id.* 97a.

Mr. King finally came to a stop at an entrance to the Hanson Dam recreation area. *Id.* 2a, 98a. Officer Melanie Singer ordered Mr. King and his companions to exit from the vehicle. *Id.* Mr. King's companions followed these instructions and were taken into custody without incident. *Id.* 98a. Mr. King repeatedly ignored Officer Singer's orders to get out of the automobile. *Id.* 98a. When he eventually emerged from the vehicle, he refused to follow repeated orders to lie on the ground. *Id.*; *see also id.* 2a.

At this point Sergeant Stacey C. Koon arrived, joined moments later by LAPD Officers Theodore J. Briseno and Rolando Solano. *Id.* 2a, 98a. Officer Melanie Singer continued to attempt unsuccessfully to get Mr. King, a "still

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[4] Mr. King was on parole from a robbery conviction. He testified that he did not stop because he did not want to return to prison. Pet. App. 97a.

unsearched felony suspect," *id.* 122a, to lie on the ground with his hands visible. *Id.* 98a. Although Officer Singer unholstered her weapon and "pointed her service revolver at him," Mr. King would not "lie prone" but instead "moved around on his hands and knees." *Id.*

Sergeant Koon commanded Officer Singer to put away her weapon, and the LAPD officers again ordered Mr. King to lie in a prone position. He continued to refuse to do so. *Id.* 2a, 98a. Officers Powell, Wind, Briseno, and Solano then jointly struggled to place Mr. King in a prone position. *Id.* Mr. King was "a large, muscular man" and, "[a]t 6'3" and approximately 225 lbs.," "appreciably larger than both Koon and Powell." *Id.* 98a, 122a. Mr. King "resisted and became combative," throwing off all four officers and "forcing [them] . . . to retreat." *Id.* 98a; *see also id.* 2a.[5]

Mr. King was "sweating profusely," and in light of his "erratic and recalcitrant behavior," the district court concluded that it was "reasonabl[e]" for Sergeant Koon "to have suspected" at this point "that Mr. King was under the influence of PCP." *Id.* 101a. Sergeant Koon fired two taser darts into Mr. King without any apparent effect, reinforcing Sergeant Koon's impression that Mr. King's conduct was the result of PCP. *Id.* 101a. The officers reasonably perceived Mr. King as dangerous; an unsearched felony suspect who was resisting arrest. *Id.* 122a.

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[5] At no time during the arrest did Sergeant Koon come in physical contact with Mr. King.

Mr. King then tried to escape, plunging into a gap between the Hyundai and a police vehicle toward an unlit portion of the Hanson Dam recreation area. *Id.* He "rapidly rose to his hands and knees, and to his feet . . . [,] turned, outstretched his arms forward, and charged towards Officer Powell." *Id.* Officer Powell struck him with a side-handle baton, unintentionally striking Mr. King's head. *Id.* 103a. Mr. King was knocked to the ground but persisted in struggling, attempting to rise, resisting commands to lie prone and continuing to "pos[e] an apparent threat." *Id.* 101a.

The latter portion of the arrest was recorded on videotape by a bystander. *Id.* 2a, 98a-99a. That videotape became the subject of widespread media attention. "It was shown over and over and over again," *Powell* v. *Superior Court*, 283 Cal. Rptr. 777, 780, 232 Cal. App. 3d 785, 790 (1991), "'from Paris to Tokyo,'" as federal prosecutors would later remind the jury, *see* Pet. App. 44a (quoting closing argument); *see also id.* 66a n.35 ("[T]he entire world was aware of the arrest of Rodney King."). The videotape "creat[ed] a vivid impression of a violent encounter." *Id.* 99a. The initial showing "caused shock, revulsion, outrage and disbelief . . . . A fire storm immediately developed in the Los Angeles area, so intense and pervasive was the reaction to the videotape." *Powell*, 283 Cal. Rptr. at 779, 232 Cal. App. 3d at 789.

As the district court found in its sentencing memorandum, however, "careful analysis shows that [the videotape was] . . . sometimes an ambiguous record of the crucial events." Pet. App. 99a. The court of appeals concurred. *Id.* 78a. Even federal prosecutors "agreed that much of the officers' conduct was justified and legal." *Id.* 99a.

Approximately the first minute of the videotape records efforts by Officers Powell and Wind to overcome Mr. King's resistance to arrest and his attempt to escape. *Id.* 2a-3a, 101a. The district court found that Officer Powell's actions during this period did not rise "to the level of criminal deprivation of Mr. King's rights." *Id.* 102a. Following a blow to Mr. King by Officer Briseno at one minute and five seconds into the videotape that Sergeant Koon "could not have anticipated," *id.* 106a, Officers Powell and Wind applied physical force during an interval lasting slightly under 19 seconds that the district court found "crossed the line between legal and illegal behavior." *Id.* 107a; *see also id.* 3a, 102a. The district court found that the application of unlawful force to Mr. King began at 1:07.28 into the videotape and ended at 1:26.00. *See id.* 102a, 107a. At approximately one minute and 30 seconds, Officer Powell gave his handcuffs to Officer Briseno, and 12 seconds later, Mr. King ultimately was handcuffed. *Id.* 102a. A few seconds later, the arrest was completed. *Id.* Sergeant Koon's ultimate conviction was predicated upon his failure to prevent illegal behavior toward Mr. King during the 19-second interval.

2. The First Prosecution

State prosecutors indicted Sergeant Koon and Officers Powell, Wind and Briseno on assault and related charges based on allegations that excessive force was used during the arrest. Pet. App. 4a. The state case was initially assigned for trial in Los Angeles, but the California Court of Appeal determined that the "massive local media coverage" had been "[s]o extensive and pervasive" and the "political fallout" "so intense" that "there [was] a reasonable likelihood that a fair and impartial trial [could

not] be had in Los Angeles County." *Powell*, 283 Cal. Rptr. at 780, 232 Cal. App. 3d at 790.[6] The case was accordingly transferred to and tried in Simi Valley, California. Pet. App. 4a. Sergeant Koon's defense during this trial was "that the force used during the arrest of King was justified and was not excessive." *Id.*[7]

On April 29, 1992, Sergeant Koon was acquitted on all charges. *Id.* His co-defendants were also acquitted of all charges, with the exception of a single assault charge against Officer Powell, on which the jury was unable to return a verdict. *Id.*

The verdicts touched off four days of extensive and widespread rioting in Los Angeles. *See generally* Greg Braxton & Jim Newton, *Looting and Fires Ravage L.A.*, L.A. TIMES, May 1, 1992, at A1. The level and extent of civil disorder during those days were among the worst in California's and, indeed, the nation's history. Fifty-three persons were killed, hundreds were injured, and more than

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[6] Publicity, emotions and the political furor surrounding the Rodney King arrest were so intense that the police chief's status became a "matter of continuing and acrimonious debate," *Powell*, 232 Cal. App. 3d at 799, the publicity eclipsed that connected with heinous crimes such as those involving Charles Manson and the "Hillside Strangler," *id.* at 798, the courts received "a threat of community violence," *id.* at 801, and the "goal of a fair trial in the locality of the crime [was] practically unattainable," *id.*

[7] The district court ultimately found that Sergeant Koon's belief that he acted lawfully, although mistaken, "reflects a personal belief which, at the time of the trial, he held in earnest." Pet App. 117a.

$1 billion in property, including over 5,000 buildings, was destroyed. George J. Church, *Cries of Relief*, TIME, Apr. 26, 1993, at 19; Douglas Jehl & Frederick M. Meier, *Bush Arrives in L.A., Calls for Healing*, L.A. TIMES, May 7, 1992, at A1; Jim Newton, *Officers Guilty, 2 Acquitted*, L.A. TIMES, Apr. 18, 1993, at A1; WILLIAM H. WEBSTER, THE CITY IN CRISIS: A REPORT BY THE SPECIAL ADVISOR TO THE BOARD OF POLICE COMMISSIONERS ON THE CIVIL DISORDER IN LOS ANGELES 23 (Oct. 1992).

3. The Second Prosecution

After the rioting, there were widespread calls from political and community leaders for federal prosecution of petitioner and his co-defendants to quell the anger in Los Angeles over the state court verdicts. Jack Nelson, *Bush Denounces Rioting in L.A. as "Purely Criminal,"* L.A. TIMES, May 1, 1992, at A9. The customary practice of the Department of Justice is not to prosecute an individual who has already been prosecuted under state law "for the same act or acts," except under "compelling" circumstances. *See Rinaldi* v. *United States*, 434 U.S. 22, 24-31 (1977). Federal prosecutors nevertheless obtained an indictment against Sergeant Koon and his co-defendants on August 4, 1992, on charges of violating 18 U.S.C. § 242. Pet. App. 4a. To obtain convictions, federal prosecutors had to prevail on the same central factual issues that had been decided in petitioner's favor by the state jury: "whether Defendants' conduct constituted a use of excessive force, and whether such use was intentional." *Id.* 147a; *see also id.* 14a ("The ultimate issue in the [federal] case was . . . whether [the defendants] . . . willfully used unreasonable force.").

The federal trial commenced on February 25, 1993, in the center of Los Angeles County, within blocks of buildings destroyed in the rioting and looting. *Id.* 4a. The

federal jury returned its verdict on April 16, 1993, but the verdict was not publicly announced until April 17, 1993. *Id.* On the morning of April 17, Los Angeles police, along with 600 National Guardsmen and United States Marines, stood by in the event of another acquittal-inspired riot. Church, *supra*, at 18. The federal jury returned guilty verdicts against Sergeant Koon and Officer Powell, however, and rioting never occurred. *See* Pet. App. 4a.

4. Sentencing

Following a hearing on August 4, 1993, Sergeant Koon was sentenced to a term of thirty months in prison and two years supervised release. Pet. App. 4a. This sentence was imposed for Sergeant Koon's failure to prevent the unlawful application of force against Mr. King by Officers Powell and Wind during the 19-second period immediately prior to the handcuffing of Mr. King. *Id.* 107a.

The district court issued a 54-page detailed, comprehensive compilation of findings and an explanation of its sentencing decision.[8] It began its sentencing

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[8] In making its findings and imposing its sentences, the trial judge, who had presided over the entire seven-week trial and heard all of the evidence, not only held a sentencing hearing, but "reviewed, read, and considered the presentence reports, the addenda thereto, the position papers and sentencing memoranda filed by the defendants and by the Government. The Court [also] . . . reviewed and considered a multitude of letters relating to the trial of this case and sentencing, and letters written in support of the defendants. The Court also . . . considered the United States Sentencing Commission *Guidelines Manual*, . . . , and the arguments of counsel." Pet. App. 95a-96a (footnote omitted).

calculations pursuant to § 2H1.4 of the United States Sentencing Guidelines, which provides that the base offense level for a violation of 18 U.S.C. § 242 is "the greater of (1) 10; or (2) 6 plus the offense level applicable to the underlying offense." Pet. App. 108a. Although petitioner had been acquitted of assault charges in the state trial, the district court agreed with the government that "the appropriate underlying offense" was "aggravated assault," which has a base offense level of 15. *Id.* 112a. The district court increased the base by 4 levels because a "dangerous weapon," *i.e.*, a side-handle baton, had been used by Officer Powell, and by 2 additional levels because the victim sustained "bodily injury," *id.* 115a, to wit: "contusions, [and] perhaps abrasions." *Id.* 105a.[9] Thus, the offense level applicable to the underlying aggravated assault offense" was 21. The district court added that offense level to 6 to obtain a final base offense level of 27 under § 2H1.4. *Id.* 115a, 118a. Based upon the Guidelines Sentencing Table, petitioner's base offense level of 27 and Criminal History Category I combined to prescribe a sentencing range of 70 to 87 months in prison. *Id.* 118a.

The district court also found, however, that "the present case is atypical in several respects," and that the "combined extraordinary circumstances of this case give rise to 'mitigating circumstances' that warrant a departure from the Guidelines range." *Id.* 130a. The court analyzed its departure decision in two categories.

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[9] Mr. King's other injuries were found to have been sustained as a consequence of lawful conduct resulting from efforts to overcome his resistance to arrest and attempt to escape. *See* Pet. App. 115a.

First, the court made a 5-level departure pursuant to Guidelines § 5K2.10, p.s., which expressly authorizes a downward departure "[i]f the victim's wrongful conduct contributed significantly to provoking the offense behavior." The court catalogued in detail "Mr. King's wrongful conduct," Pet. App. 121a, 122a-123a, which included "illegal conduct prior to and during his arrest," *id.* 121a. Among other things, the court found that Mr. King drove while "admittedly intoxicated," exceeded the speed limit, fled police officers in his vehicle despite their "flashing police lights and sirens," "resisted and evaded arrest, persistently failed to comply with police commands . . . and attempted to escape." *Id.* 121a-122a. The use of force was "provoked substantially, if not entirely, by Mr. King." *Id.* 122a. Sergeant Koon was convicted for failing to prevent "conduct which began as a legal use of force against a resistant suspect and subsequently crossed the line to unlawfulness, all in a matter of seconds, during the course of a dynamic arrest situation." *Id.* 123a. Even though "Mr. King's provocative behavior eventually subsided," *id.* 123a, the court determined that the entire incident "would not have escalated to [the] point [of unlawful activity], indeed it would not have occurred at all, but for Mr. King's initial misconduct." *Id.*

Such provocative victim misconduct, the court concluded, was sufficiently unusual to move this case outside the "heartland" of offenses governed by the applicable Guidelines, thereby justifying a downward departure pursuant to § 5K2.10, p.s. *Id.* 124a. Based upon the factors set forth in that provision, its extensive and detailed factual findings, as well as "the overall standards and policies of the Guidelines, and its own discretion in attempting to fashion a fair sentence," *id.* 132a, the court determined that a 5-level departure was appropriate to

distinguish Sergeant Koon's conduct from cases involving "deliberate and unprovoked assaultive conduct." *Id.* 124a.

Second, "[b]ased on a convergence of three additional factors," *id.* 134a, the district court made an additional 3-level downward departure. The court relied upon the following factors:

(1) **"Additional Punishment."** Sergeant Koon has "already sustained, and will continue to incur, punishment in addition to the sentence imposed." *Id.* 120a, 124a-126a. In that regard, "[t]he extraordinary notoriety and national media coverage of this case, coupled with . . . [his] status as [a] police officer[ ], make [Sergeant] Koon . . . unusually susceptible to prison abuse." *Id.* 120a. Sergeant Koon also "will be subjected to multiple adversarial proceedings and stripped of . . . [his] position and tenure by the LAPD." *Id.*

(2) **"Absence of Need to Protect the Public."** "[A]dequate deterrence to criminal conduct" is an express statutory sentencing factor. *Id.* 128a. "[T]here is no evidence, and the government does not argue, that . . . [Sergeant] Koon . . . [is] dangerous or likely to commit crimes in the future." *Id.* 120a, 128a-129a.

(3) **"Successive State and Federal Prosecutions."** Under the extraordinary circumstances of this case, "the successive state and federal prosecutions, though legal, raise a specter of unfairness." *Id.* 120a. Indeed, the court found that Sergeant Koon was indicted and tried a second time "only after a state court jury acquitted . . . [him] of charges based on the same underlying conduct," *id.*, creating "an unusual circumstance, and significantly burden[ing] the defendants," *id.* 130a.

While none of these factors, "[s]tanding alone," justified a departure from the Guidelines, *id.* 120a, the court found that "taken together" (*id.* 121a) this "complex of three factors" justified a 3-level departure, *id.* 134a.

The total 8-level downward departure reduced the offense level for Sergeant Koon to 19, resulting in a Guidelines sentencing range of 30 to 37 months. As noted above, the court sentenced him to 30 months in prison and two years of supervised probation.

Sergeant Koon entered prison on October 12, 1993, after his applications for bail pending appeal were denied. *See Koon* v. *United States*, 114 S. Ct. 296 (1993) (mem.); *United States* v. *Koon*, 6 F.3d 561 (9th Cir. 1993).

B. The Decision Of The Court Below

On August 19, 1994, the court of appeals affirmed Sergeant Koon's conviction but reversed the district court's sentencing decision. The court reviewed de novo the district court's decision to exercise its discretion to depart downward from the sentence range prescribed by the Guidelines. *See* Pet. App. 57a ("We review de novo whether the district court had authority to depart.").

The court of appeals rejected the district court's 5-level departure for provocative victim misconduct, even though that factor is expressly authorized by the Guidelines as a ground for departure and despite recognition by the court that conduct by a victim provoking an incident could in some circumstances provide the predicate for a downward departure in a police misconduct case, depending on the particular facts. *See id.* 76a n.38. The court did not question the district court's findings of "King's misconduct" — "speeding, driving while intoxicated, fleeing in his car from pursuing police officers, refusing to

obey the officers' commands to get on the ground and remain prone, attempting to escape from police custody, charging Powell." *Id.* 70a. Nor did the court take issue with the district court's findings that, absent Mr. King's misconduct prior to and during the arrest, the 19-second incident that formed the basis of Sergeant Koon's conviction would never have happened.

The court of appeals nevertheless reversed the district court's finding that victim misconduct warranted a downward departure in this case. In doing so, the court did not cite any language in the Guidelines or sentencing statutes. It relied instead on general sentencing policies and this Court's excessive force analysis in *Graham* v. *Connor*, 490 U.S. 386 (1989). Based on that analysis, the court of appeals rejected the district court's findings that Mr. King's provocative and wrongful behavior, coupled with the volatile and "dynamic arrest situation," made this case sufficiently unusual to justify departing from the Guidelines. *See* Pet. App. 73a-76a.

The court of appeals also reversed the district court's 3-level departure. The court declared that the three factors considered by the district court were impermissible considerations "as part of the decision to depart." *Id.* 59a. Again, the court did not point to any textual basis for deciding that the respective factors relied on by the district court were prohibited from consideration in the context of a departure. Rather, it engaged in an extended analysis of its view of the "structure and purposes of the Guidelines and the federal sentencing statutes." *Id.*; *see id.* 59a-69a. "In sum," the court concluded, "consideration of any of the factors identified by the district court to support the three-level departure, separately or collectively is, *under the facts of this case*, inconsistent with the structure and policies of

the Guidelines. These factors are improper grounds on which to rest a departure." *Id.* 69a (emphasis added).

The court of appeals remanded the case to the district court for resentencing.[10]

C. The Denial Of The Petition For Rehearing And Suggestion For Rehearing *En Banc* And The Opinion Of The Dissenting Judges

The court of appeals denied Sergeant Koon's petition for rehearing and suggestion for rehearing *en banc*. Nine judges (Reinhardt, Pregerson, Wiggins, Kozinski, Noonan, Hawkins, O'Scannlain, T.G. Nelson, and Kleinfeld, JJ.) dissented from that order. Pet. App. 81a.

In an opinion written by Judge Reinhardt, the dissenters argued that "the panel seriously erred in vacating the downward departures ordered by Judge Davies." *Id.* 81a. They explained that

> the district court acted well within its discretion in sentencing the defendants to prison terms below the Guidelines range. Sergeant Koon and Officer Powell were first-time offenders. The sentences ordered by Judge Davies were severe indeed. Neither law nor justice requires that they be set aside or that any longer prison terms be imposed.

Id.

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[10] The court of appeals subsequently granted petitioner's motion for a stay of its mandate pending the filing of a petition for writ of certiorari in this Court, and that stay will remain in effect until this Court's final disposition of this case. Pursuant to the sentence originally imposed by the district court, Sergeant Koon has been released from prison but remains incarcerated in a half-way house. He will have completed the sentence imposed by the district court on December 14, 1995.

The dissenting judges rejected the standard of appellate review applied by the panel in reversing the district court's departure from the Guidelines. They noted that the "panel's decision squarely conflicts with the considerably more flexible approach adopted by the First Circuit in" *United States* v. *Rivera*, 994 F.2d 942 (1st Cir. 1993). Pet. App. 89a-90a. The panel had taken a "mechanical and inflexible approach" that "casts aside the basic principles that should underlie judicial sentencing, even in the age of the Guidelines," and had thus impermissibly "encroach[ed] on district court discretion." *Id.* 81a. "Indeed, under the panel's view of the district judge's role in sentencing, district courts would be divested of much of the limited discretion they retain under the Guidelines." *Id.* 82a.

Accordingly, the dissenting judges concluded that, "[i]n choosing to apply a highly limited view of judicial discretion to the case of Koon and Powell, the panel accomplishes little except to undo a perfectly proper sentence, and to treat the defendants in a harsh and unfair manner." *Id.* 89a.

SUMMARY OF ARGUMENT

The decision below strips virtually all discretion from sentencing judges and makes every sentence reviewable de novo if any deviation is made from the Sentencing Guidelines. Such a result is not authorized or required by the Sentencing Reform Act or the Sentencing Guidelines, is contrary to historic practice and will create an administrative nightmare for the federal appellate courts.

1. This Court has identified a number of factors for determining the proper standard of appellate review of particular types of trial court determinations. *See, e.g.*, *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384 (1990); *Pierce* v. *Underwood*, 487 U.S. 552 (1988). All of these factors strongly support application of the deferential, abuse-of-discretion standard to district court decisions exercising discretion to depart from the range of sentences imposed by the Sentencing Guidelines.

a. The language and structure of the Sentencing Reform Act demonstrate that abuse-of-discretion is the appropriate standard of review. The Act expressly required the Sentencing Commission to maintain "sufficient flexibility to permit individualized sentencing" where warranted by mitigating or aggravating factors not fully and expressly addressed by the Sentencing Guidelines themselves. *See* 28 U.S.C. § 991(b)(1)(B). Congress intentionally "preserve[d] for the judge the discretion to depart from" the Guidelines range pursuant to 18 U.S.C. § 3553(b). *Mistretta* v. *United States*, 488 U.S. 361, 367 (1989). The Sentencing Commission, in turn, gave district courts the discretion to depart from the Guidelines range of sentences in "unusual" or "atypical" cases. Except for a few expressly articulated prohibitions set forth in the Guidelines, the Commission has declared, and this Court has recognized, that neither the Act nor the Guidelines limit the number of potential factors that may warrant departure in an unusual case. *See, e.g.*, U.S.S.G. Ch. I, Pt. A, intro. comment. (4)(b); *Burns* v. *United States*, 501 U.S. 129, 136-37 (1991).

The Act authorizes only limited, narrow appellate review of district court sentencing decisions. *Williams* v. *United States*, 503 U.S. 193, 195, 199 (1992). It does not, on its face, authorize de novo review of any

issue. On the contrary, it expressly requires deferential "clearly erroneous" review of district court factual findings, and instructs the courts of appeals to give "due regard" to the district court's opportunity "to judge the credibility of witnesses" and also to give "due deference to the district court's application of the guidelines to the facts." 18 U.S.C. § 3742(e).

While the Act does not define precisely what level of deference is "due" a departure decision, the abuse-of-discretion standard is clearly the most appropriate standard. The text of the Act shows that Congress sought to preserve "individualized sentencing" in unusual cases and intended that courts of appeals defer to district court discretionary judgments. The decision to depart from the Guidelines is a quintessential exercise of sentencing discretion, and, accordingly, calls for an abuse-of-discretion standard of review on appeal.

b. Application of the abuse-of-discretion standard to departure decisions is likewise consistent with historical appellate practice in the federal judicial system. Federal district courts traditionally enjoyed broad discretion to impose criminal sentences within statutory limits. Throughout much of the nation's history, federal appellate courts deferred almost completely to district court sentencing determinations. And, as this Court recognized in *Williams*, 503 U.S. at 205, the Sentencing Reform Act was *not* intended, except where expressly provided, to "alter a court of appeals' traditional deference to a district court's exercise of its sentencing discretion." Nothing in the Act suggests that Congress intended to eliminate the traditional deference on appeal to a district court's exercise of discretion when departing from the Guidelines.

c. The abuse-of-discretion standard comports with, and will materially further, the "sound administration of

justice" because district courts are in the best institutional position to determine whether the specific facts and circumstances at issue are so unusual that a departure from the Guidelines is appropriate to ensure a fair and just punishment. Congress recognized that affording district courts discretion to depart from the Guidelines would provide the Sentencing Commission with an important resource for revising the Guidelines to take into account factors that were not adequately considered by the Commission in its prior deliberations. De novo appellate review of departure decisions would be inconsistent with this carefully crafted framework, allowing the courts of appeals to make sentencing policy decisions that are, by statute, reserved for the Commission.

d. The complex and highly individualized nature of the issues involved in a departure decision also militates decisively in favor of the abuse-of-discretion standard. When a district court determines that a case, because of its peculiar facts and circumstances, is "unusual" or "atypical," the court is, by definition, engaging in precisely the sort of *sui generis* inquiry that is not likely to be replicated and is incapable of useful generalization.

2. The district judge acted well within his discretion to depart downward in this case.

a. The district court's decision to depart 5 levels on the basis of provocative victim misconduct was not an abuse of discretion. The district court's 5-level departure involved an application of the Guidelines to the peculiar and extraordinary facts of this case. The Guidelines expressly authorize and encourage consideration of departure from the Guidelines in cases of victim provocation, and nothing in the text of the relevant Guidelines or statutes restricts consideration of the circumstances of the victim's conduct in an excessive force

case. The district court made detailed and thorough findings that Mr. King's repeated and persistent acts of unlawfulness and provocation prompted the offense conduct, providing an ample basis for the downward departure.

b. Nor did the district court abuse its discretion in making its 3-level departure. The district court properly relied on a combination of factors that are not withdrawn from district court consideration by the Guidelines. The court found, on the facts of this case, that the convergence of special factors made the case unusual. That determination was an entirely proper exercise of discretion entitled to full respect and deference on appeal.

ARGUMENT

I

THE DEFERENTIAL, ABUSE-OF-DISCRETION STANDARD OF REVIEW APPLIES TO DISTRICT COURT DECISIONS TO DEPART FROM THE SENTENCING GUIDELINES

This Court confronts frequently the question of the proper standard of appellate review for particular types of trial court determinations. *See, e.g., Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384 (1990). While the Court has not attempted "to discern or to create a comprehensive test" for deciding what standard of review governs an issue, *Pierce* v. *Underwood*, 487 U.S. 552, 559 (1988), it has identified "significant relevant factors [that] call for an 'abuse of discretion' standard." *Id.* at 559. Such factors include: (1) "the language and structure of the governing statute," *id.*; (2) "historical tradition," *id.* at 558; (3) whether "'as a matter of sound administration of justice'" the district court is in a better position than the court of appeals to decide the issue, *id.* at 559-60 (quoting *Miller* v.

Fenton, 474 U.S. 104, 114 (1985)); and (4) "'the sheer impracticability of formulating a rule of decision for the matter in issue" due to the fact that the issue involves "'multifarious, fleeting, special, narrow facts that utterly resist generalization,'" *id.* at 561-62 (quoting Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635, 662-63 (1971)). As demonstrated below, all four of these factors strongly favor deferential, abuse-of-discretion review of district court sentencing decisions.

A. The Language And Structure Of The Sentencing Reform Act Demonstrate That Abuse-Of-Discretion Is The Proper Standard Of Review

The language and structure of the Sentencing Reform Act require application of the abuse-of-discretion standard of review to district court decisions to depart from the range of sentences established by the Sentencing Guidelines. Congress intended for district courts to retain discretion to depart from the Guidelines range in unusual or atypical cases. The Sentencing Commission, in implementing the Act, has delineated certain factors that cannot be considered as a basis for departure and declared that, other than these factors, there are no prescribed limits on the types of factors that may form the basis of a departure.

Congress authorized "limited" and "narrow" appellate review of district court departure decisions. *Williams*, 503 U.S. at 196, 199. But, Congress intended for the courts of appeals to defer to district court discretionary judgments about whether a departure is warranted on the facts of a particular case. Absent language in the text of the relevant Guidelines or statutes expressly prohibiting departure on particular grounds, therefore, the decision of a district court to depart from the Guidelines is a quintessential exercise of

discretion that may be reviewed on appeal only for an abuse of that discretion.

1. The Sentencing Reform Act And Its Implementing Guidelines Authorize Federal District Courts To Exercise Their Discretion And Depart From The Guidelines In Unusual Or Atypical Cases

Congress enacted the Sentencing Reform Act to limit the sentencing discretion of federal district courts in ordinary cases and thereby to eliminate sentencing disparities in comparable cases. *See generally Mistretta* v. *United States*, 488 U.S. 361, 364 (1989). Although Congress sought to establish criteria to guide the exercise of the federal sentencing power, it did not intend to "remove all of the [district] judge's sentencing discretion." S. REP. No. 225, 98th Cong., 1st Sess. 51 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3234. Indeed, Congress "'desire[d] to leave substantial sentencing discretion in the hands of the sentencing judge.'" *Nichols* v. *United States*, 114 S. Ct. 1921, 1930 n* (1994) (Souter, J., concurring in the judgment) (quoting Marc Miller & Daniel J. Freed, *Honoring Judicial Discretion Under the Sentencing Reform Act*, 3 FED. SENT. R. 235, 238 (1991)). Congress, therefore, rejected a system of "strict determinate sentencing," and instead established a guidelines system that would "reduc[e] sentence disparities while retaining the flexibility needed to adjust for unanticipated factors arising in a particular case." *Mistretta*, 488 U.S. at 367.

Congress created the United States Sentencing Commission and authorized it to establish Sentencing Guidelines that "maintai[n] *sufficient flexibility to permit individualized sentences* when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices." 28 U.S.C.

§ 991(b)(1)(B) (emphasis added). As the Senate Report on the Act states, the Guidelines were "not intend[ed] . . . [to] be applied in a mechanistic fashion." S. REP. NO. 225, *supra*, at 52, *reprinted in* 1984 U.S.S.C.A.N. at 3235. Rather, the Senate Committee

> believe[d] that the sentencing judge has an obligation to consider all relevant factors in a case and impose a sentence outside the guidelines in an appropriate case. The purpose of the sentencing guidelines is to provide a structure for evaluation of the fairness and appropriateness of the sentence for an individual offender, not to eliminate the thoughtful imposition of individualized sentences.

Id.

Recognizing that "each offender stands before a court as an individual, different in some ways from other offenders" and that "[t]he offense, too, may have been committed under highly individual circumstances," the Senate Committee concluded:

> Even the fullest consideration and the most subtle appreciation of the pertinent factors — the facts in the case; the mitigating or aggravating circumstances; the offender's characteristics and criminal history; and the appropriate purposes of the sentence to be imposed in the case — cannot invariably result in a predictable sentence being imposed. Some variation is not only inevitable, but desirable.

S. REP. NO. 225, *supra*, at 150, *reprinted in* 1984 U.S.S.C.A.N. at 3333.

Congress therefore directed federal district judges generally to impose a sentence within the range prescribed by the Sentencing Guidelines, 18 U.S.C. §§ 3553(a)(4), (b), but "preserve[d] for the judge the discretion to depart from" that prescribed range in certain cases pursuant to 18 U.S.C. § 3553(b). *Mistretta*, 488 U.S. at 367. The Act authorizes a departure if the trial "court *finds* that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines." 18 U.S.C. § 3553(b) (emphasis added). In fact, the departure finding is precluded only if the proposed departure factor was not adequately considered by the Sentencing Commission based "*only* [on] the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission." *Id.* (emphasis added); *Stinson* v. *United States*, 113 S. Ct. 1913, 1917 (1993). Thus, the Act expressly authorizes a trial court to "find" a basis for a departure decision unless Sentencing Commission Guidelines, policy statements or commentaries have explicitly and adequately considered that factor.

The Sentencing Guidelines implement the Act's grant of discretion to sentencing judges by recognizing explicitly that a district court has discretion to depart from the Guidelines in an "unusual" or "atypical" case. U.S.S.G. Ch. I, Pt. A, intro. comment. (4)(b). Indeed, the Sentencing Commission intended for each guideline to "carv[e] out a 'heartland,' a set of typical cases embodying the conduct that each guideline describes." *Id.* The Guidelines establish a formula for calculating the appropriate sentence for cases that fall within this heartland. A district court may, however, depart from the Guidelines calculations in a case in "which a particular guideline linguistically applies but where conduct significantly differs from the norm." *Id.*

The Commission expected that departures from the Guidelines, when they occurred, would be part of the initial process by which the Guidelines evolved. Thus, the Commission stated that "[b]y monitoring when courts depart from the guidelines and by analyzing their stated reasons for doing so . . . the Commission, over time, will be able to refine the guidelines to specify more precisely when departures should and should not be permitted." *Id.*

With the exception of a limited number of specifically stated forbidden grounds for departure,[11] therefore, the Commission did "not intend to limit the kinds of factors, whether or not mentioned anywhere in the guidelines, that could constitute grounds for departure in an unusual case." *Id.* [T]he Guidelines place essentially no limit on the number of potential factors that may warrant a departure." *Burns* v. *United States*, 501 U.S. 129, 136-37 (1991).

The Guidelines specifically encourage departure based on certain factors, *see, e.g.*, U.S.S.G. Pt. 5K; *id.* § 2G1.1, comment., such as a crime victim's own misconduct that provokes the offense behavior, *id.* § 5K2.10. The Commission deemed certain other factors, such as the age of the wrongdoer, as not "ordinarily" warranting departure, *id.*, Ch. 5, Pt. H intro. comment.; *id.* § 5H1.1, p.s., but

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[11] A district court may not depart on the basis of race, sex, national origin, creed, religion, and socio-economic status, U.S.S.G. § 5H1.10, p.s.; lack of guidance as a youth and similar circumstances, *id.* § 5H1.12, p.s.; physical condition, including drug dependence and alcohol use, *id.* § 5H1.4, p.s.; or coercion and duress, *id.* § 5K2.12, p.s. *See id.*, Ch. I, Pt. A, intro. comment. 4(b). None of these factors was relied upon by the district court here in making its departures.

even these factors may provide grounds for departure if they are present in an extraordinary or unique way, *id.* § 5K2.0, p.s. As long as the district court finds that a case is "unusual" based on factors not expressly rejected by the Guidelines or already expressly taken into account by the Guidelines for the relevant offense conduct, the district court is given "legal freedom" to exercise its discretion to depart. *Id.*, Ch. 1, Pt. A, intro. comment. (4)(b); *see Rivera*, 994 F.2d at 949 (the sentencing court "retains . . . freedom to depart whether such departure is encouraged, discouraged, or unconsidered by the Guidelines").

The reason for affording such latitude in the context of departures is clear. As the Commission has acknowledged, "it is difficult to prescribe a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision," especially during these early stages of the Guidelines system. U.S.S.G., Ch. 1, Pt. A, intro. comment. (4)(b). Moreover, the Commission recognized that, even with continuing revision of the Guidelines, there would always be grounds for departure that "cannot, by their very nature, be comprehensively listed and analyzed in advance." *Id.*, § 5K2.0, p.s.

In short, except for a limited category of expressly prohibited considerations, a district court has discretion to depart from the Sentencing Guidelines based on circumstances that render a case outside the normal range of the fact pattern to which the prescribed Guideline range was intended to apply.

2. The Sentencing Reform Act Requires Abuse-Of-Discretion Review That Respects District Court Discretionary Judgments To Depart From The Guidelines

Congress provided for appellate review of departure decisions pursuant to 18 U.S.C. § 3742.[12] But as this Court has recognized, that review is "narrow" and "limited." *Williams*, 503 U.S. at 196, 199. The statutory language — the starting point for determining the standard of appellate review, *see Pierce*, 487 U.S. at 558-59 — does not contain *any* provision explicitly authorizing de novo review of district court sentencing decisions. "Congress could easily have used the phrase 'de novo' or 'plenary' if it had wanted to confer such broad review power." Steven E. Zipperstein, *Certain Uncertainty: Appellate Review and the Sentencing Guidelines*, 66 S. CAL. L. REV. 621, 636 (1992).

Congress did, however, employ language that requires deference to district court decisions. For example, the Act requires that

> [t]he court of appeals shall give *due regard* to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are *clearly erroneous* and shall give *due deference* to

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[12] If the district court departs upward from the prescribed guideline range, the defendant may obtain appellate review of the sentence. *See* 18 U.S.C. § 3742(a); *Williams*, 503 U.S. at 198-99. Conversely, if a downward departure occurs, the government may appeal the sentence. *See* 18 U.S.C. § 3742(b); *Williams*, 503 U.S. at 199.

> the district court's application of the guidelines to the facts.

18 U.S.C. § 3742(e) (emphasis added).[13]

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[13] The legislative history of 18 U.S.C. § 3742 confirms that Congress intended for appellate courts to review departure decisions with deference. Commenting on the original version of 18 U.S.C. § 3742 enacted as part of the Sentencing Reform Act of 1984, the Senate Report recognized that the Section 3742 established only "a *limited* practice of appellate review of sentences," S. REP. NO. 225, *supra*, at 149 (emphasis added), *reprinted in* 1984 U.S.C.C.A.N. at 3332. The Senate Committee stated that, while the appellate review provisions were intended to control and guide sentencing discretion, they were also "designed to preserve the concept that the discretion of a sentencing judge has a proper place in sentencing and should not be displaced by the discretion of an appellate court." S. REP. NO. 225, *supra*, at 150, *reprinted in* 1984 U.S.C.C.A.N. at 3333.

In 1988, Congress reaffirmed in even more forceful language its direction that appellate sentencing review should be deferential. The original version of 18 U.S.C. § 3742(e), as enacted in 1984, did not contain a requirement that appellate courts "give due deference to the district court's application of the guidelines to the facts." *See* Pub. L. No. 98-473, Ch. II, § 213, 98 Stat. 2012. That requirement was added by Congress as part of the Omnibus Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7103(a)(7), 102 Stat. 4181, 4417. The congressional statement concerning the amendment explained that, although a de novo standard should apply to appellate review of "a district court determination of a legal question," it would be "inappropriate" for an appellate court to engage in de novo review of questions involving application of the Guidelines — *even those questions for which "the overall determination is*

The Act states that departures shall be based upon a "find[ing]" that certain circumstances exist, 18 U.S.C. § 3553(b), and also states that an appeals court "shall affirm" reasonable departures. *See* 18 U.S.C. § 3742(f)(2)-(3); *Rivera*, 994 F.2d at 952. It provides that an appellate court may reverse a sentencing judge's departure decision only if "the sentence was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines," 18 U.S.C. § 3742(f)(1), or "the sentence is unreasonable," 18 U.S.C. § 3742(f)(2); *see Williams*, 503 U.S. at 202. While the Act does not expressly define what standard of appellate review applies to a district court's decision to depart from the Guidelines range, the language and structure of the Act strongly support application of an abuse-of-discretion standard and leave virtually no room for any other construction.

By taking the unusual step of expressly requiring "clearly erroneous" review of factual findings, and mandating that appellate courts give "due regard" to the district court's opportunity to participate directly in the trial and "due deference" to the district court's application of the Guidelines to its factual findings, Congress clearly intended to give the district courts latitude to make discretionary judgments where the Guidelines themselves do not expressly remove the court's discretion. Moreover, the Act declares that Congress intended to "maintai[n] sufficient *flexibility* to permit *individualized sentences* when

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not an objective finding of fact" and "not uniquely within the district court's expertise." 134 CONG. REC. H11257 (daily ed. Oct. 21, 1988) (emphasis added).

warranted by mitigating or aggravating factors not taken into account" by the Sentencing Commission. 28 U.S.C. § 991(b)(1)(B) (emphasis added). This textual emphasis on flexibility and individualized sentences in departure cases "emphasizes the fact that the determination is for the district court to make, and thus suggests some deference to the district court upon appeal." *Pierce*, 487 U.S. at 559.

The need for deference on appeal is particularly compelling in the context of a district court's decision to depart from the Guidelines in an unusual case — a quintessential exercise of judicial discretion. Indeed, "a decision to depart from the guidelines represents the ultimate exercise of discretion within the framework of the Act." Zipperstein, *supra*, 66 S. CAL. L. REV. at 635. The abuse-of-discretion standard is therefore the most obvious and appropriate standard for review of such decisions, and it is entirely consistent with the statute and the Guidelines.

As one commentator has observed,

> The abuse-of-discretion standard allows appellate courts enough control over district court decisionmaking to ensure compliance with the guidelines. At the same time, it keeps enough review power out of the hands of the appellate courts to ensure that they too remain faithful to the guidelines. . . . [A]ppellate courts exceed their authority when they effectively add new provisions to the guidelines, when they announce new criteria permitting departures, and when they otherwise use the power of de novo review to announce rules that undermine the purposes of guidelines.

Id. at 638.[14]

A district court's finding in a particular case that "there exists an aggravating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission," 18 U.S.C. § 3553(b), may, in rare cases, raise a "quintessentially legal" question involving the interpretation of "a set of words" of a statute or Guideline that might appropriately be reviewed de novo on appeal. *Rivera*, 994 F.2d at 951. The *Rivera* court, for example, noted that "plenary review is appropriate where the question on review is simply whether or not the allegedly special circumstances (i.e., the reasons for departure) are the 'kind' that the Guidelines, *in principle*, permit the sentencing court to consider at all." *Id.* (emphasis in original). But these instances will necessarily be rare. Indeed, the Sentencing Commission has identified only a handful of factors that cannot, as a matter of law, be considered in making a departure, *see, e.g.*, page 26 n.11, *supra*, and announced that it otherwise does "not intend to limit the kinds of factors . . . that could constitute grounds for departure in an unusual case." U.S.S.G. Ch. I, Pt. A, intro. comment. (4)(b). In fact, "the Commission itself has explicitly *said* that (with a few exceptions), it did not 'adequately' take *unusual* cases 'into consideration.'" *Rivera*, 994 F.2d at 947 (emphasis in original). Accordingly, "appellate courts should review the district court's determination of 'unusualness' with 'full awareness of, and respect for, the trier's superior "feel" for the case,'

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[14] The author of the quoted article is the Chief Assistant U.S. Attorney in the Los Angeles office that prosecuted Sergeant Koon.

not with the understanding that review is 'plenary.'" *Id.* at 952 (citations omitted).

B. Historical Tradition Requires An Abuse-Of-Discretion Standard For Review Of District Court Departure Decisions

As this Court has recognized, "a long history of appellate practice" may also militate in favor of a particular standard of review. *Pierce*, 487 U.S. at 558. By this measure, abuse-of-discretion review is appropriate for sentencing departures in light of the long tradition of appellate deference to district court sentencing determinations.

Throughout much of the nation's history prior to the enactment of the Sentencing Reform Act, federal district courts possessed extraordinarily broad discretion in criminal sentencing. *Mistretta*, 488 U.S. at 363-64. As a general matter, the district court could "conduct an inquiry broad in scope, largely unlimited either as to the kind of information" considered "or the source from which" that information came. *Witte* v. *United States*, 115 S. Ct. 2199, 2205 (1995) (quotations omitted); *see, e.g., Wasman* v. *United States*, 468 U.S. 559, 563 (1984); *United States* v. *Tucker*, 404 U.S. 443, 446 (1972); *Williams* v. *New York*, 337 U.S. 241, 246 (1949). A sentencing judge considered "'every aspect of the defendant's life,'" *Wasman*, 468 U.S. at 572 (quoting *Williams*, 337 U.S. at 250), taking into account "'a wide variety of factors in addition to evidence bearing on guilt,'" *Nichols* v. *United States*, 114 S. Ct. 1921, 1928 (1994) (quoting *Wisconsin* v. *Mitchell*, 113 S. Ct. 2194, 2199 (1993)), and arrived at an independent determination of the appropriate sentence, usually constrained only by constitutional requirements, *see, e.g., Solem* v. *Helm*, 463 U.S. 277 (1983), and the "customarily

wide range" of punishment prescribed by statute, *Mistretta*, 488 U.S. at 364.

On appeal, the sentencing judge's decision was "met with virtually unconditional deference" by appellate judges. *Mistretta*, 488 U.S. at 364. Thus, "a sentence imposed by a federal district judge, if within statutory limits," was "generally not subject to review." *Tucker*, 404 U.S. at 447.

Application of an abuse-of-discretion standard of review to district court Guidelines departure decisions is fully consistent with, and required by, this historical practice. In *Williams*, this Court held that the Sentencing Reform Act was *not* intended to displace district court discretion or to intensify appellate review except in those areas expressly stated. As the Court declared:

> Although the Act established a limited appellate review of sentencing decisions, it did not alter a court of appeals' traditional deference to a district court's exercise of its sentencing discretion. The selection of the appropriate sentence from within the guideline range, *as well as the decision to depart from the range in certain circumstances, are decisions that are left solely to the sentencing court.*

Williams, 503 U.S. at 205 (emphasis added). "[E]xcept to the extent specifically directed by statute, 'it is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence.'" *Williams*, 503 U.S. at 205 (quoting *Solem*, 463 U.S. at 290 n.16).

Congress vested district courts with discretion to depart from the Guidelines in unusual cases. But it "did not alter

[the] court of appeals' traditional deference to a district court's exercise of its sentencing discretion." *Id.* Indeed, the Act includes numerous provisions confirming that such deference should continue. Historical practice, therefore, is consistent with the language of the Act, its history, the Guidelines, and this Court's decisions, that an abuse-of-discretion review standard should be applied to district court departure decisions.

C. The Sound Administration Of Justice Favors The Abuse-Of-Discretion Standard Because District Courts Are In A Better Position Than The Courts Of Appeals To Determine Whether A Case Is Unusual Or Atypical

Application of the abuse-of-discretion standard of review for departure decisions is also appropriate because, "as a matter of the sound administration of justice," the district court is in the best position to determine whether a departure is warranted. *See generally Pierce*, 487 U.S. at 559-60 (in determining the proper standard of review, "sometimes the decision 'has turned on a determination that, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question'") (quoting *Miller* v. *Fenton*, 474 U.S. 104, 114 (1985)); *see, e.g., Cooter & Gell*, 496 U.S. at 403-04. Indeed, there can be no doubt that the district court is in the best position to decide whether the facts and circumstances of a case are so unusual that a departure from the Guidelines is warranted. As a result of direct participation in the trial and sentencing proceedings, "the sentencing judge 'sees more and senses more' than the appellate court," and "'enjoy[s] the superiority of his nether position.'" *Mistretta*, 488 U.S. at 364 (quoting Rosenberg, *supra*, 22 SYRACUSE L. REV. at 663).

"Appellate review under the guidelines must respect the legislative framework established by Congress as well as the authority of the Sentencing Commission as the arbiter of sentencing policy." Zipperstein, *supra*, 66 S. CAL. L. REV. at 638. Abuse-of-discretion review of district court departure decisions is the only mode of review consistent with the institutional framework established by the Act. Deference to district court determinations regarding the unusualness of a case effectuates the congressional intent that the *Sentencing Commission* — not the courts of appeals — develop the rules regarding which factors are to be considered in sentencing. *Cf. Braxton* v. *United States*, 500 U.S. 344, 348 (1991) (noting that the congressional directive for the Sentencing Commission "'periodically [to] review and revise' the Guidelines" justifies the Supreme Court in being "more restrained and circumspect in using . . . [its] certiorari power"). As *Rivera* explains, "[t]o ignore the district court's special competence — about the 'ordinariness' or 'unusualness' of a particular case — would risk depriving the Sentencing Commission of an important source of information, namely, the reactions of the trial judge to the fact-specific circumstances of the case, which reactions, reduced to written reasons for departure, can help the Commission determine whether, and how, Guidelines revision should take place." 994 F.2d at 951.

D. The Multifarious, Novel Nature Of The Issues Involved In Departure Decisions Makes Abuse-Of-Discretion The Appropriate Standard of Review

Deference to district court departure decisions is also consistent with the general principle that a district court should have discretion in making decisions that are bound up in the facts and circumstances of the specific case. A departure determination ultimately involves "a judgment about whether the given circumstances, as seen from the district court's unique vantage point, are usual or unusual,

ordinary or not ordinary, and to what extent." *Rivera*, 994 F.2d at 951. Such a fact-intensive judgment does not easily lend itself to fixed legal rules since the particular facts underlying departure decisions are likely to vary significantly from one case to another. "[B]ecause the number of possible situations is large," this Court should be "reluctant either to fix or sanction narrow . . . [rules] for the district courts to follow" in making these determinations. *Curtiss-Wright Corp.* v. *General Electric Co.*, 446 U.S. 1, 10-11 (1980).

Indeed, the determination whether a particular factual situation is an atypical case will, by definition, not be an issue likely to recur in another case. There is therefore little need to treat the issue as a question of law. *Cf. United States* v. *Kim*, 23 F.3d 513, 517 (D.C. Cir. 1994) ("A district court's determination that a given set of facts constitute 'obstruction of justice' (as the guidelines use that term) or involve more than minimal planning, will typically not be exactly replicated in any other case. And therefore there is less reason to insist on the uniformity that a question of law typically requires.").

"The highly situation-specific nature of the Guidelines factors suggests that appellate courts should accord great deference to ensuing district court determinations — both with respect to the threshold decision to impose a sentence below the Guidelines in the first instance, as well as to the district court's determination of the extent of departure warranted." *United States* v. *Yellow Earrings*, 891 F.2d 650, 654-55 (8th Cir. 1989). These determinations present "precisely" the type of "multifarious and novel question" that is "little susceptible . . . of useful generalization, and likely to profit from the experience that an abuse-of-discretion rule will permit to develop." *Pierce*, 487 U.S. at 562; *see also Cooter & Gell*, 496 U.S. at 404 (same).

II

THE DISTRICT COURT ACTED WELL WITHIN ITS DISCRETION WHEN IT DECIDED TO MAKE DOWNWARD DEPARTURES FROM THE GUIDELINES IN THIS CASE

A. The District Court Acted Within Its Discretion When It Made A 5-Level Departure Based Upon Provocative Victim Misconduct, An Explicitly Encouraged Basis For Departure Under The Guidelines

1. The 5-Level Victim Misconduct Departure Is Subject Only To Abuse-Of-Discretion Review

The district court's decision to make a 5-level departure based on Mr. King's conduct in this case is subject only to abuse-of-discretion review on appeal. Section 5K2.10 of the Guidelines provides: "If the victim's wrongful conduct contributed significantly to provoking the offense behavior, the court may reduce the sentence below the guidelines range to reflect the nature and circumstances of the offense." Thus, there is no statutory prohibition of consideration of a victim's conduct as a basis for departure in this case. The Guidelines encourage the district judge to do so. Indeed, there can be no question that a victim's wrongful conduct is "of the 'kind' that the Guidelines, *in principle*, permit the sentencing court to consider" (*Rivera*, 994 F.2d at 951) as a basis for departure since the victim's conduct is specifically authorized and *encouraged* as a basis for departure pursuant to § 5K2.10, p.s.

Neither the text of the Guideline applicable to Sergeant Koon's offense, § 2H1.4, nor the commentary to that Guideline reveals any basis for concluding that victim provocation may not be a departure factor in excessive force cases. In fact, although the commentary to § 5K2.10, p.s., lists several types of offenses for which a § 5K2.10

departure is inappropriate, excessive force and other civil rights cases governed by § 2H1.4 are *not* included among that list. *See* U.S.S.G. § 5K2.10 comment. (victim misconduct departure ordinarily not appropriate for sexual abuse and property offenses). And even the Ninth Circuit acknowledged that a victim's provocation could conceivably provide a basis for departure in excessive force cases. *See* Pet. App. 76a n.38 ("We do not conclude that a departure for victim misconduct would *never* be permissible in a public case.").

The closest the Ninth Circuit could come to finding any textual support for its decision that the departure here was improper was to assert that the "structure of § 2H1.4" prohibits victim misconduct departures in cases involving public officials because § 2H1.4 "punishes those vested with governmental authority *more* severely than private actors who are guilty of comparable conduct." Pet. App. 74a. The fact that governmental actors are generally punished more severely than non-governmental actors, however, is hardly a sufficient textual basis from which a court may determine, as a matter of law, that victim provocation is not an appropriate basis for departure in this case. Indeed, by that method of statutory interpretation, no departure on *any* ground would ever be permitted in excessive force cases because any departure would reduce the sentence imposed on a public official. Neither the Act nor the Guidelines contemplates such a result.

Absent any statutory or Guidelines text upon which to rely, the Ninth Circuit grounded its decision on *Graham* v. *Connor*, 490 U.S. 386 (1989). The court held that the *Graham* standard of liability already takes into account "the dynamic arrest situation," Pet. App. 73a, and that "[t]he incorporation of this consideration into the basic fabric of the law in this area strongly suggests that provocation by

the victim in a situation where an officer must act instantly is typical — not unusual," *id.* But there is no basis in the Guidelines to presume that the Commission intended for the *Graham* standard to preclude the district court's consideration of provocative victim misconduct in determining whether an excessive force case is sufficiently unusual to warrant departure. Indeed, as noted above, the Commission stated that it did "*not* intend to limit the kinds of factors, whether or not mentioned anywhere in the guidelines, that could constitute grounds for departure in an unusual case," U.S.S.G. Ch. I, Pt. A, intro. comment. (4)(b) (emphasis added). Thus, rather than excluding that factor, the Guidelines in fact establish a general presumption that the victim's conduct, as well as any other type of mitigating factor not expressly prohibited as a basis for departure, may be considered in determining whether any such case is unusual. Victim provocation may not invariably warrant a departure, but the district judge in this case explained that the facts here were highly unusual.

As the dissenting judges below concluded, "the panel's treatment of the five-point departure . . . [was] dictated less by the language or spirit of the Guidelines than by hostility to Judge Davies' decision to depart." Pet. App. 88a. The central issues addressed by the district court under § 5K2.10, p.s. — whether Mr. King engaged in "wrongful conduct" and whether his conduct "contributed significantly to provoking the offense behavior" — are ultimately questions involving "the district court's application of the guidelines to the facts." The district court's resolution of these issues is therefore entitled to "due deference" as required by 18 U.S.C. § 3742(e), and cannot be disturbed absent an abuse of discretion.

2. The District Court Did Not Abuse Its Discretion In Making The 5-Level Downward Departure

The district court's determination that Mr. King engaged in conduct that contributed materially in bringing about the transition across the "thin line" between the legal use of force in overcoming dangerous resistance to an arrest and the unlawful application of force is supported by numerous factual findings affirmed by the court of appeals. Mr. King "consumed more than 80 ounces" of alcohol, Pet. App. 97a, and "was admittedly intoxicated" while driving, *id.* 121a. "He exceeded the speed limit at times," *id.*, driving "in excess of 100 m.p.h.," *id.* 97a. He "failed to stop his vehicle, even after he belatedly perceived the flashing police lights and sirens." *Id.* 121a. After exiting the freeway, Mr. King eluded three police vehicles in an eight-mile chase. *Id.* 98a. He resisted initial police orders to step out of his car. *Id.* 121a-122a. He refused to lie prone as ordered. *Id.* 122a. He "resisted and became combative," throwing off four police officers and "forcing . . . [them] to retreat." *Id.* 98a. He "attempted to escape from police custody," *id.* 122a, "charg[ing] towards Officer Powell," *id.* 101a, and shrugged off the electrical charge of two taser darts. Mr. King was sweating profusely, appeared to be under the influence of PCP, did not permit himself to be searched for deadly weapons and was reasonably perceived as dangerous. Even the Government concluded that in this context, "much of the officers' conduct was justified and legal." *Id.* 99a.

The district court's conclusion that Mr. King's wrongful conduct "contributed significantly to provoking the offense behavior," *id.* 121a, is additionally supported by numerous factual findings affirmed by the court of appeals. "Had Mr. King pulled over, and not caused the CHP officers to pursue him for up to eight miles," Sergeant Koon and the other LAPD officers "would not have been summoned."

Id. 122a. Sergeant Koon "did not seek out a victim"; rather he was present only as "a consequence of Mr. King's wrongful conduct." *Id.* Once at the scene, Mr. King further provoked the offense by refusing to obey police officers' orders, throwing off four police officers, attempting to escape, and charging Officer Powell. *See id.* 121a-122a. Had Mr. King not engaged in such dangerous and threatening conduct, "all in a matter of seconds, during the course of a dynamic arrest situation," *id.* 123a, when "police officers are . . . forced to make split-second judgments — in circumstances that are tense, uncertain, and rapidly evolving," *Graham*, 490 U.S. at 396-97, the 19-second incident that produced Sergeant Koon's conviction would have never occurred in the first place. *Id.* 123a.[15]

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[15] The district court's determination to depart based on victim misconduct is further supported by consideration of relevant factors listed under § 5K2.10, p.s. *See* U.S.S.G. § 5K2.10, p.s.; Pet. App. 122a-123a & n.13. With respect to the size, strength and other relevant physical characteristics of Mr. King vis-à-vis the defendants, *see* U.S.S.G. § 5K2.10(a), p.s., the district court found that "[a]t 6'3" and approximately 225 lbs., Mr. King was appreciably larger than both Koon and Powell." Pet. App. 122a. As for the persistence of Mr. King's wrongful conduct, *see* U.S.S.G. § 5K2.10(b), p.s., the district court found that he "resisted and evaded arrest" despite being pursued "for up to eight miles" and that Mr. King "persistently failed to comply with police commands." Pet. App. 122a. Addressing efforts made by Sergeant Koon to prevent confrontation, *see* U.S.S.G. § 5K2.10(b), p.s., the district court found that Sergeant Koon specifically "ordered Officer Melanie Singer to holster her service revolver." Pet. App. 98a. With respect to the danger reasonably perceived by Sergeant Koon, *see* U.S.S.G. § 5K2.10(c), p.s., the district court concluded that Sergeant Koon's "early perception of Mr. King as dangerous was reasonable," Pet. App. 122a, that "a reasonable officer at the scene may have judged that Mr. King was reaching for a weapon" at one point during the arrest, *id.* 104a, and that "[a]t least during the initial stages of the arrest process, Sergeant Koon may reasonably have suspected that Mr. King was under the influence of PCP because of Mr. King's erratic and recalcitrant behavior," *id.* 101a. And as for the danger actually presented to Sergeant Koon by Mr. King, *see* U.S.S.G. § 5K2.10(d), p.s., the district court noted that Mr. King was an "unsearched felony suspect," Pet. App. 122a, had thrown off four police officers trying to subdue him, and had charged a police officer while attempting to escape from custody, *id.*

The Ninth Circuit accepted the district court's determination that Mr. King engaged in extremely dangerous conduct that went well beyond the initial occasion for his arrest, but rejected the departure on the basis of its own judgment as to whether the conduct sufficiently provoked "the offense behavior." *See* Pet. App. 70a-71a. That issue, however, is precisely the type of fact-intensive determination that Congress intended for district courts to retain wide discretion to make in departure cases. Regardless how an appellate court might decide the matter on a de novo basis, the district court's factual findings provided a sufficient basis for its conclusion that a departure based on § 5K2.10, p.s. was warranted in this case. The trier of fact's decision clearly was not an abuse of discretion.

B. The District Court Acted Within Its Discretion When It Made A 3-Level Departure Based Upon A Combination Of Various Factors Not Prohibited By The Guidelines

1. The 3-Level Departure Based Upon A Combination Of Factors That Make The Case Unusual Is Subject Only To Abuse-Of-Discretion Review

The district court also granted a 3-level departure based upon a combination of three factors that, when considered together, gave "rise to 'mitigating circumstances' that warrant a departure from the Guidelines range." Pet. App. 130a. The court below independently scrutinized each of the multiple factors relied upon by the district court, to determine whether, in its view, each was "'appropriate' to support a departure." *Id.* 83a (dissent from denial of rehearing *en banc*). But the "panel failed to make the proper inquiry: whether the factor was *prohibited* by the Guidelines. Instead, it created its own category of *inappropriate* factors, namely those which are not prohibited but which in the panel's opinion do not warrant a departure." *Id.* 83a-84a (emphasis in original).

This approach is plainly improper. The district court's reliance on a combination of factors to justify its 3-level departure does not even arguably present pure legal questions suitable for de novo review. The lengthy analysis of these factors by the court of appeals does not hinge on a legal interpretation of "a set of words" in the Guidelines, *Rivera*, 994 F.2d at 951, but rather is an expression of the court's general views on the "structure and policies of the Guidelines and the federal sentencing statutes." Pet. App. 59a. To the extent that sort of analysis is permissible at all under the Sentencing Reform Act, it is for the Commission, not the courts of appeals, to make. The simple fact is that the Commission has said it does *not* intend to preclude

district courts from considering *any* factors as grounds for departure, unless such factors are expressly identified in the Guidelines. The district court's reliance here on several non-prohibited factors to depart was a pure exercise of discretion reserved to it by the Guidelines and the statute, and its departure on that basis cannot be overturned unless the court abused that discretion.

2. The District Court Did Not Abuse Its Discretion In Making The 3-Level Downward Departure

Each of the factors underlying the 3-level departure has a substantial factual basis in this case and supports the district court's finding that this case falls outside the heartland of cases to which § 2H1.4 applies. The court of appeals' reversal of this departure simply is an improper attempt to second-guess the district court's evaluation of the unusualness of the facts of this case.

There can be no doubt that the circumstances surrounding Sergeant Koon's successive prosecutions are "unique." Sergeant Koon was tried twice for essentially the same offense in an environment that carried with it the threat of rioting on an unprecedented scale if he were not convicted at the second trial. The district court was fully aware that the pressures to convict Sergeant Koon were overwhelming.

The court of appeals rejected the district court's reliance on the issues of fairness presented by the successive prosecutions not on the basis of any explicit Guidelines provision prohibiting consideration of this factor. Rather, the Ninth Circuit opined that the successive prosecutions consideration "speaks neither to the culpability of the defendant, the severity of the offense, nor some other legitimate sentencing concern." Pet. App. 69a. Yet, surely a district court could reasonably conclude that the

defendant's prior *acquittal*, and his second trial, and the extraordinary pressures that accompanied each prosecution — for the same underlying conduct — is a valid consideration in determining the defendant's culpability and the severity of the offense.

Moreover, regardless of the constitutional implications of the two prosecutions, the court could consider the burdens imposed by the successive prosecutions for the same conduct as factors in determining how much additional punishment to impose. Well before the founding of this Nation, English common law barred an English prosecution if the defendant had already been tried and acquitted by a foreign government, *see, e.g., Roche's Case* (1775), 1 Leach C.L. 34 (4th ed. 1815); *Beak* v. *Thyrwhit*, 87 Eng. Rep. 124; 4 WILLIAM BLACKSTONE, COMMENTARIES *335; J.A.C. Grant, *Successive Prosecutions by State and Nation: Common Law and British Empire Comparisons*, 4 UCLA L. REV. 1 (1956), and the laws of many states, including California, prohibit state prosecution of an act already prosecuted by another sovereign, *see, e.g.*, CAL. CONST., art. I, § 15; CAL. PENAL CODE §§ 656, 793-94 (West 1988); *People* v. *Comingore*, 570 P.2d 723 (Cal. 1977). The district court was well within its discretion to recognize the principles that underlie such a doctrine in calibrating the appropriate magnitude of the penalty here. Neither the Sentencing Reform Act nor the Guidelines precluded that analysis, and the Ninth Circuit should not have substituted its judgment in that regard for that of Congress and the Sentencing Commission.

Similarly, the district court did not abuse its discretion when it considered the highly unusual circumstances relating to the potential for additional punishment of Sergeant Koon beyond that inflicted by the sentence itself.

The saturation of publicity surrounding Sergeant Koon's prosecution, coupled with his status as a police officer, ensured that Sergeant Koon would be subject to additional danger in prison to a degree not experienced by the typical defendant. Although the Guidelines to a certain extent take into account a prisoners' vulnerability to physical assault, *see United States* v. *Lara*, 905 F.2d 599, 603 (2d Cir. 1990); Pet. App. 125a, the district court was not prohibited by the Guidelines from evaluating this factor to the extent that it was present in this case to a degree not contemplated by the Commission. *See* 18 U.S.C. § 3553(b); U.S.S.G. § 5K2.0, p.s. Moreover, the high-profile of Sergeant Koon's case in the media also ensured that Sergeant Koon would be subject to the fullest extent of punishment under LAPD disciplinary proceedings. This Court has recently confirmed that "district courts under the Guidelines retain enough flexibility in appropriate cases" to depart downward based on punishment imposed for the same underlying conduct in another case and that the defendant in such a case is "free to put his argument concerning the unusual facts of this case to the sentencing judge as a basis for discretionary downward departure." *Witte* v. *United States*, 115 S. Ct. 2199, 2209 (1995).

Finally, the district court properly took into account the absence of need to protect the public from further criminal activity by Sergeant Koon. The court found, and the government did not dispute, "that neither Koon nor Powell are violent, dangerous, or likely to engage in future criminal activity." Pet. App. 129a. Such considerations of deterrence were certainly properly taken into account by the district court. Indeed, 18 U.S.C. § 3553(a)(2)(C) mandates review of that factor: "[t]he court, in determining the particular sentence to be imposed, *shall consider* the need for the sentence imposed to protect the public from further crimes of the defendant." (emphasis added).

Irrespective of whether any of the factors relied upon by the district court for the 3-level departure could, standing alone, justify the three-level departure, these factors, when viewed *in combination*, provide a reasonable basis for the district court's departure. As the Ninth Circuit itself has observed:

> In making a decision in any particular case, good judgment will often require the evaluation of a complex of factors. No single factor may be enough to point to the wise course of decision. But a wise person will not look on each particular factor abstractly and alone. Rather, it will be how the particular pieces fit together, converge, and influence each other that will lead to the correct decision.

United States v. *Cook*, 938 F.2d 149, 153 (9th Cir. 1991). Accordingly, courts have recognized that a "unique combination of factors" may render a case atypical and thus warrant a district court's decision to depart, even though none of those factors, considered alone, would justify a departure. *See, e.g., id.*; *United States* v. *Anders*, 956 F.2d 907, 911 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1592 (1993); *United States* v. *Sklar*, 920 F.2d 107, 117 (1st Cir. 1990).

CONCLUSION

The district court acted within the discretion traditionally accorded sentencing judges, and not withdrawn from them by the Sentencing Reform Act or the Sentencing Guidelines. The court of appeals erroneously overrode that entirely proper exercise of discretion. If the Ninth Circuit's approach is upheld, decisions that should ultimately be

made by the Sentencing Commission will be made by appellate courts, and ultimately this Court, contrary to the clear intent of Congress.

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STATUTORY APPENDIX

STATUTES AND SENTENCING GUIDELINES

18 U.S.C. § 242 (1988)
(Deprivation of rights under color of law)

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if bodily injury results shall be fined under this title or imprisoned not more than ten years, or both; and if death results shall be subject to imprisonment for any term of years or for life.

28 U.S.C. § 991 (1988)
(United States Sentencing Commission; establishment and purposes)

(a) There is established as an independent commission in the judicial branch of the United States a United States Sentencing Commission which shall consist of seven voting members and one nonvoting member. The President, after consultation with representatives of judges, prosecuting attorneys, defense attorneys, law enforcement officials, senior citizens, victims of crime, and others interested in the criminal justice process, shall appoint the voting members of the Commission, by and with the advice and consent of the Senate, one of whom shall be appointed, by and with the advice and consent of the Senate, as the Chairman. At least three of the members shall be Federal

judges selected after considering a list of six judges recommended to the President by the Judicial Conference of the United States. Not more than four of the members of the Commission shall be members of the same political party. The Attorney General, or his designee, shall be an ex officio, nonvoting member of the Commission. The Chairman and members of the Commission shall be subject to removal from the Commission by the President only for neglect of duty or malfeasance in office or for other good cause shown.

(b) The purposes of the United States Sentencing Commission are to—

(1) establish sentencing policies and practices for the Federal criminal justice system that—

(A) assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code;

(B) provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices; and

(C) reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process; and

(2) develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing as set

forth in section 3553(a)(2) of title 18, United States Code.

18 U.S.C. § 3553 (1988)
(Imposition of a sentence)

(a) FACTORS TO BE CONSIDERED IN IMPOSING A SENTENCE.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines that are issued by the Sentencing Commission pursuant to 28 U.S.C.

994(a)(1) and that are in effect on the date the defendant is sentenced;

(5) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2) that is in effect on the date the defendant is sentenced;

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

(b) APPLICATION OF GUIDELINES IN IMPOSING A SENTENCE.—The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

(c) STATEMENT OF REASONS FOR IMPOSING A SENTENCE.—The court, at the time of sentencing, shall state

in open court the reasons for its imposition of the particular sentence, and, if the sentence—

(1) is of the kind, and within the range, described in subsection (a)(4), and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons to the Probation System, and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

(d) PRESENTENCE PROCEDURE FOR AN ORDER OF NOTICE.—Prior to imposing an order of notice pursuant to section 3555, the court shall give notice to the defendant and the Government that it is considering imposing such an order. Upon motion of the defendant or the Government, or on its own motion, the court shall—

(1) permit the defendant and the Government to submit affidavits and written memoranda addressing matters relevant to the imposition of such an order;

(2) afford counsel an opportunity in open court to address orally the appropriateness of the imposition of such an order; and

(3) include in its statement of reasons pursuant to subsection (c) specific reasons underlying its determinations regarding the nature of such an order.

Upon motion of the defendant or the Government, or on its own motion, the court may in its discretion employ any

additional procedures that it concludes will not unduly complicate or prolong the sentencing process.

(e) LIMITED AUTHORITY TO IMPOSE A SENTENCE BELOW A STATUTORY MINIMUM.—Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

18 U.S.C. § 3742 (Supp. II 1990)
(Review of a sentence)

(a) APPEAL BY A DEFENDANT.—A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines; or

(3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range, or includes a more limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the maximum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

(b) APPEAL BY THE GOVERNMENT.—The Government, may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is less than the sentence specified in the applicable guideline range to the extent that the sentence includes a lesser fine or term of imprisonment, probation, or supervised release than the minimum established in the guideline range, or includes a less limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the minimum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

The Government may not further prosecute such appeal without the personal approval of the Attorney General, the Solicitor General, or a deputy solicitor general designated by the Solicitor General.

(c) PLEA AGREEMENTS.—In the case of a plea agreement that includes a specific sentence under rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure—

(1) a defendant may not file a notice of appeal under paragraph (3) or (4) of subsection (a) unless the

sentence imposed is greater than the sentence set forth in such agreement; and

(2) the Government may not file a notice of appeal under paragraph (3) or (4) of subsection (b) unless the sentence imposed is less than the sentence set forth in such agreement.

(d) RECORD ON REVIEW.—If a notice of appeal is filed in the district court pursuant to subsection (a) or (b), the clerk shall certify to the court of appeals—

(1) that portion of the record in the case that is designated as pertinent by either of the parties;

(2) the presentence report; and

(3) the information submitted during the sentencing proceeding.

(e) CONSIDERATION.—Upon review of the record, the court of appeals shall determine whether the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is outside of the applicable guideline range, and is unreasonable, having regard for—

(A) the factors to be considered in imposing a sentence, as set forth in chapter 227 of this title; and

(B) the reasons for the imposition of the particular sentence, as stated by the district

court pursuant to the provisions of section 3553(c); or

(4) was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable.

The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and shall give due deference to the district court's application of the guidelines to the facts.

(f) DECISION AND DISPOSITION.—If the court of appeals determines that the sentence—

(1) was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(2) is outside the applicable guideline range and is unreasonable or was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable, it shall state specific reasons for its conclusions and—

(A) if it determines that the sentence is too high and the appeal has been filed under subsection (a), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(B) if it determines that the sentence is too low and the appeal has been filed under subsection (b), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(3) is not described in paragraph (1) or (2), it shall affirm the sentence.

(g) APPLICATION TO A SENTENCE BY A MAGISTRATE.—An appeal of an otherwise final sentence imposed by a United States magistrate may be taken to a judge of the district court, and this section shall apply (except for the requirement of approval by the Attorney General or the Solicitor General in the case of a Government appeal) as though the appeal were to a court of appeals from a sentence imposed by a district court.

(h) GUIDELINE NOT EXPRESSED AS A RANGE.—For the purpose of this section, the term "guideline range" includes a guideline range having the same upper and lower limits.

U.S.S.G. CHAPTER ONE - INTRODUCTION AND GENERAL APPLICATION PRINCIPLES
(Nov. 1992)

Part A - Introduction

* * * * *

2. <u>The Statutory Mission</u>

* * * * *

Pursuant to the Act, the sentencing court must select a sentence from within the guideline range. If, however, a particular case presents atypical features, the Act allows the court to depart from the guidelines and sentence outside the prescribed range. In that case, the court must specify reasons for departure. 18 U.S.C. § 3553(b). If the court sentences within the guideline range, an appellate court may review the sentence to determine whether the guidelines were correctly applied. If the court departs from the guideline range, an appellate court may review the reasonableness of the departure. 18 U.S.C. § 3742. . . . .

* * * * *

The initial sentencing guidelines and policy statements were developed after extensive hearings, deliberation, and consideration of substantial public comment. The Commission emphasizes, however, that it views the guideline-writing process as evolutionary. It expects, and the governing statute anticipates, that continuing research, experience, and analysis will result in modifications and revisions to the guidelines through submission of amendments to Congress. To this end, the Commission is established as a permanent agency to monitor sentencing practices in the federal courts.

3. <u>The Basic Approach</u> (Policy Statement)

* * * * *

In its initial set of guidelines, the Commission sought to solve both the practical and philosophical problems of developing a coherent sentencing system by taking an empirical approach that used as a starting point data estimating pre-guidelines sentencing practice. It analyzed

data drawn from 10,000 presentence investigations, the differing elements of various crimes as distinguished in substantive criminal statutes, the United States Parole Commission's guidelines and statistics, and data from other relevant sources in order to determine which distinctions were important in pre-guidelines practice. After consideration, the Commission accepted, modified, or rationalized these distinctions.

This empirical approach helped the Commission resolve its practical problem by defining a list of relevant distinctions that, although of considerable length, was short enough to create a manageable set of guidelines. Existing categories are relatively broad and omit distinctions that some may believe important, yet they include most of the major distinctions that statutes and data suggest made a significant difference in sentencing decisions. Relevant distinctions not reflected in the guidelines probably will occur rarely and sentencing courts may take such unusual cases into account by departing from the guidelines.

* * * * *

4. The Guidelines' Resolution of Major Issues (Policy Statement)

* * * * *

(b) Departures.

The sentencing statute permits a court to depart from a guideline-specified sentence only when it finds "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the sentencing Commission in formulating the guidelines that should result in a sentence different from that described." 18 U.S.C. § 3553(b). The Commission intends the sentencing courts to treat each guideline as carving out a

"heartland," a set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted. Section 5HI.10 (Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status), § 5HI.12 (Lack of Guidance as a Youth and Similar Circumstances), the third sentence of § 5H1.4 (Physical Condition, Including Drug Dependence and Alcohol Abuse), and the last sentence of § 5K2.12 (Coercion and Duress) list several factors that the court cannot take into account as grounds for departure. With those specific exceptions, however, the Commission does not intend to limit the kinds of factors, whether or not mentioned anywhere else in the guidelines, that could constitute grounds for departure in an unusual case.

The Commission has adopted this departure policy for two reasons. First, it is difficult to prescribe a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision. The Commission also recognizes that the initial set of guidelines need not do so. The Commission is a permanent body, empowered by law to write and rewrite guidelines, with progressive changes, over many years. By monitoring when courts depart from the guidelines and by analyzing their stated reasons for doing so and court decisions with references thereto, the Commission, over time, will be able to refine the guidelines to specify more precisely when departures should and should not be permitted.

Second, the Commission believes that despite the courts' legal freedom to depart from the guidelines, they will not do so very often. This is because the guidelines, offense by offense, seek to take account of those factors that the Commission's data indicate made a significant

difference in pre-guidelines sentencing practice. Thus, for example, where the presence of physical injury made an important difference in pre-guidelines sentencing practice (as in the case of robbery or assault), the guidelines specifically include this factor to enhance the sentence. Where the guidelines do not specify an augmentation or diminution, this is generally because the sentencing data did not permit the Commission to conclude that the factor was empirically important in relation to the particular offense. Of course, an important factor (e.g., physical injury) may infrequently occur in connection with a particular crime (e.g., fraud). Such rare occurrences are precisely the type of events that the courts' departure powers were designed to cover--unusual cases outside the range of the more typical offenses for which the guidelines were designed.

It is important to note that the guidelines refer to two different kinds of departure. The first involves instances in which the guidelines provide specific guidance for departure by analogy or by other numerical or non-numerical suggestions. For example, the Commentary to § 2GI.1 (Transportation for the Purpose of Prostitution or Prohibited Sexual Conduct) recommends a downward departure of eight levels where a commercial purpose was not involved. The Commission intends such suggestions as policy guidance for the courts. The Commission expects that most departures will reflect the suggestions and that the courts of appeals may prove more likely to find departures "unreasonable" where they fall outside suggested levels.

A second type of departure will remain unguided. It may rest upon grounds referred to in Chapter Five, Part K (Departures) or on grounds not mentioned in the guidelines. While Chapter Five, Part K lists factors that the Commission believes may constitute grounds for departure, the list is not exhaustive. The Commission recognizes that there may be other grounds for departure that are not

mentioned; it also believes there may be cases in which a departure outside suggested levels is warranted. In its view, however, such cases will be highly infrequent.

* * * * *

5. A Concluding Note

The Commission emphasizes that it drafted the initial guidelines with considerable caution. It examined the many hundreds of criminal statutes in the United States Code. It began with those that were the basis for a significant number of prosecutions and sought to place them in a rational order. It developed additional distinctions relevant to the application of these provisions and it applied sentencing ranges to each resulting category. In doing so, it relied upon pre-guidelines sentencing practice as revealed by its own statistical analyses based on summary reports of some 40,000 convictions, a sample of 10,000 augmented presentence reports, the parole guidelines, and policy judgments.

The Commission recognizes that some will criticize this approach as overly cautious, as representing too little a departure from pre-guidelines sentencing practice. Yet, it will cure wide disparity. The Commission is a permanent body that can amend the guidelines each year. Although the data available to it, like all data, are imperfect, experience with the guidelines will lead to additional information and provide a firm empirical basis for consideration of revisions.

* * * * *

U.S.S.G. §2A2.2 (Nov. 1992)
Aggravated Assault

(a) Base Offense Level: **15**

(b) Specific Offense Characteristics

(1) If the assault involved more than minimal planning, increase by **2** levels.

(2) (A) If a firearm was discharged, increase by **5** levels; (B) if a dangerous weapon (including a firearm) was otherwise used, increase by **4** levels; (C) if a dangerous weapon (including a firearm) was brandished or its use was threatened, increase by **3** levels.

(3) If the victim sustained bodily injury increase the offense level according to the seriousness of the injury:

Degree of Bodily Injury	Increase in Level
(A) Bodily Injury	add **2**
(B) Serious Bodily Injury	add **4**
(C) Permanent or Life-Threatening Bodily Injury	add **6**

(D) If the degree of injury is between that specified in subdivisions (A) and (B), add **3** levels; or

(E) If the degree of injury in between that specified in subdivisions (B) and (C), add **5** levels.

Provided, however, that the cumulative adjustments from (2) and (3) shall not exceed **9** levels.

(4) If the assault was motivated by a payment or offer of money or other thing of value, increase by **2** levels.

Commentary

Statutory Provisions: 18 U.S.C. §§ 111, 112, 113(b), (c), (f), 114, 115(a), (b)(1), 351(e), 1751(e). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. *"Aggravated assault" means a felonious assault that involved (a) a dangerous weapon with intent to do bodily harm (i.e., not merely to frighten), or (b) serious bodily injury, or (c) an intent to commit another felony.*

2. *Definitions of "more than minimal planning," firearm," "dangerous weapon," "brandished," "otherwise used," "bodily injury," "serious bodily injury," and "permanent or life-threatening bodily injury," are found in the Commentary to* §1B1.1 *(Application Instructions).*

3. *This guideline also covers attempted manslaughter and assault with intent to commit manslaughter. Assault with intent to commit murder is covered by §2A2.1. Assault with intent to commit rape is covered by §2A3.1.*

Background: This section applies to serious (aggravated) assaults. Such offenses occasionally may involve planning or be committed for hire. Consequently, the structure follows §2A2.1.

There are a number of federal provisions that address varying degrees of assault and battery. The punishments under these statutes differ considerably, even among provisions directed to substantially similar conduct. For

example, if the assault is upon certain federal officers "while engaged in or on account of ... official duties," the maximum term of imprisonment under 18 U.S.C. § 111 is three years. If a dangerous weapon is used in the assault on a federal officer, the maximum term of imprisonment is ten years. However, if the same weapon is used to assault a person not otherwise specifically protected, the maximum term of imprisonment under 18 U.S.C. § 113(c) is five years. If the assault results in serious bodily injury, the maximum term of imprisonment under 18 U.S.C. § 113(f) is ten years, unless the injury constitutes maiming by scalding, corrosive, or caustic substances under 18 U.S.C. § 114, in which case the maximum term of imprisonment is twenty years.

U.S.S.G. §2H1.4 (Nov. 1992)
Interference with Civil Rights Under Color of Law

(a) Base Offense Level (Apply the greater):

(1) **10**; or

(2) **6** plus the offense level applicable to any underlying offense.

Commentary

Statutory Provisions: 18 U.S.C. § 242.

Application Notes:

1. *"6 plus the offense level applicable to any underlying offense" means 6 levels above the offense level for any underlying criminal conduct. See the discussion in the Commentary to §2H1.1.*

2. *Do not apply the adjustment from §3B1.3 (Abuse of Position of Trust or Use of Special Skill).*

Background: This maximum term of imprisonment authorized by 18 U.S.C. § 242 is one year if no bodily injury results, ten years if bodily injury results, and life imprisonment if death results. A base offense level of 10 is prescribed at §2H1.4(a)(1) providing a guideline sentence near the one-year statutory maximum for cases not resulting in death or bodily injury because of the compelling public interest in deterring and adequately punishing those who violate civil rights under color of law. The Commission intends to recommend that this one-year statutory maximum penalty be increased. An alternative base offense level is provided at §2H1.4(a)(2). The 6-level increase under subsection (a)(2) reflects the 2-level increase that is applied to other offenses covered in this Part plus a 4-level increase for the commission of the offense under actual or purported legal authority. This 4-level increase is inherent in the base offense level of 10 under subsection (a)(1).

Enhancement under §3B1.3 (Abuse of Position of Trust or Use of Special Skill) is inappropriate because the base offense level in §2H1.4(a) reflects that the abuse of actual or purported legal authority is inherent in the offense.

U.S.S.G. §5K2.0 (Nov. 1992)
Grounds for Departure (Policy Statement)

Under 18 U.S.C. § 3553(b) the sentencing court may impose a sentence outside the range established by the applicable guideline, if the court finds "that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." Circumstances that may warrant departure from the guidelines pursuant to this provision cannot, by their very nature, be comprehensively listed and analyzed in advance.

The controlling decision as to whether and to what extent departure is warranted can only be made by the courts. Nonetheless, this subpart seeks to aid the court by identifying some of the factors that the Commission has not been able to take into account fully in formulating the guidelines. Any case may involve factors in addition to those identified that have not been given adequate consideration by the Commission. Presence of any such factor may warrant departure from the guidelines, under some circumstances, in the discretion of the sentencing court. Similarly, the court may depart from the guidelines, even though the reason for departure is taken into consideration in the guidelines (e.g., as a specific offense characteristic or other adjustment), if the court determines that, in light of unusual circumstances, the guideline level attached to that factor is inadequate.

Where, for example, the applicable offense guideline and adjustments do take into consideration a factor listed in this subpart, departure from the applicable guidelines range is warranted only if the factor is present to a degree substantially in excess of that which ordinarily is involved in the offense. Thus, disruption of a governmental function, §5K2.7, would have to be quite serious to warrant departure from the guidelines when the applicable offense guideline is bribery or obstruction of justice. When the theft offense guideline is applicable, however, and the theft caused disruption of a governmental function, departure from the applicable guideline range more readily would be appropriate. Similarly, physical injury would not warrant departure from the guidelines when the robbery offense guideline is applicable because the robbery guideline includes a specific adjustment based on the extent of any injury. However, because the robbery guideline does not deal with injury to more than one victim, departure would be warranted if several persons were injured.

Also, a factor may be listed as a specific offense characteristic under one guideline but not under all guidelines. Simply because it was not listed does not mean that there may not be circumstances when that factor would be relevant to sentencing. For example, the use of a weapon has been listed as a specific offense characteristic under many guidelines, but not under immigration violations. Therefore, if a weapon is a relevant factor to sentencing for an immigration violation, the court may depart for this reason.

U.S.S.G. §5K2.10 (Nov. 1992)
Victim's Conduct (Policy Statement)

If the victim's wrongful conduct contributed significantly to provoking the offense behavior, the court may reduce the sentence below the guideline range to reflect the nature and circumstances of the offense. In deciding the extent of a sentence reduction, the court should consider:

(a) the size and strength of the victim, or other relevant physical characteristics, in comparison with those of the defendant;

(b) the persistence of the victim's conduct and any efforts by the defendant to prevent confrontation;

(c) the danger reasonably perceived by the defendant, including the victim's reputation for violence;

(d) the danger actually presented to the defendant by the victim; and

(e) any other relevant conduct by the victim that substantially contributed to the danger presented.

Victim misconduct ordinarily would not be sufficient to warrant application of this provision in the context of offenses under Chapter Two, Part A.3 (Criminal Sexual Abuse). In addition, this provision usually would not be

relevant in the context of non-violent offenses. There may, however, be unusual circumstances in which substantial victim misconduct would warrant a reduced penalty in the case of a non-violent offense. For example, an extended course of provocation and harassment might lead a defendant to steal or destroy property in retaliation.

Supreme Court, U.S.
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DEC 8 1995
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Nos. 94-1664 and 94-8842

In the Supreme Court of the United States

OCTOBER TERM, 1995

STACEY C. KOON, PETITIONER

v.

UNITED STATES OF AMERICA

LAURENCE M. POWELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether, in reviewing the district court's determination that several factors formed a valid basis for a departure from the sentencing range applicable to petitioners under the Sentencing Guidelines, the court of appeals correctly applied a de novo standard of review and correctly concluded as a matter of law that the district court in this case departed downward on the basis of invalid factors.

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Miscellaneous:

Black's Law Dictionary (6th ed. 1990) 25
133 Cong. Rec. (1987):
p. 33,108 17-18
p. 33,109 17
134 Cong. Rec. 33,303 (1988) 27
S. Rep. No. 225, 98th Cong., 1st Sess. (1983) 16, 17

20, 21, 26, 29
United States Attorney's Manual 41

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United States Sentencing Commission, *Guidelines Manual* (Nov. 1994) 17
United States Sentencing Commission, *Annual Report* (1994) 32

In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 94-1664

STACEY C. KOON, PETITIONER

v.

UNITED STATES OF AMERICA

No. 94-8842

LAURENCE M. POWELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-79a)[1] is reported at 34 F.3d 1416. The court of appeals' denial of the petition for rehearing and suggestions of rehearing en banc (Pet. App. 80a-93a) is reported at 45 F.3d 1303. The sentencing opinion of the district court (Pet. App. 94a-138a) is reported at 833 F. Supp. 769.

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[1] References to "Pet. App." are to the appendix to the petition in No. 94-1664.

JURISDICTION

The judgment of the court of appeals was entered on August 19, 1994. The petitions for rehearing were denied on January 12, 1995. Pet. App. 80a-81a. The petition for a writ of certiorari in No. 94-1664 was filed on April 10, 1995. The petition for a writ of certiorari in No. 94-8842 was filed on April 12, 1995. The Court granted both petitions on September 27, 1995. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. 3553(a) and (b) and 18 U.S.C. 3742(a)-(f) are reprinted in the appendix to this brief (App., *infra*, 1a-5a).

STATEMENT

Following a jury trial in the United States District Court for the Central District of California, petitioner Powell was convicted of willfully using unreasonable force during the arrest of Rodney King, in violation of 18 U.S.C. 242. Petitioner Koon was convicted of willfully permitting other police officers to use unreasonable force during King's arrest, in violation of 18 U.S.C. 242. Petitioners were sentenced to 30 months' imprisonment. The court of appeals affirmed the convictions, but vacated the sentences and remanded for resentencing.

1. In the early morning hours of March 3, 1991, Rodney King was driving while intoxicated on a freeway in Los Angeles, California. Officers of the California Highway Patrol (CHP) observed King's car speeding and began to pursue it. When the car left the freeway, the CHP officers radioed for help, and officers of the Los Angeles Police Department (LAPD) joined in the pursuit. The pursuit ended when King pulled his car into an entrance to a recreation area. Petitioner Powell was one

of the LAPD officers who pursued King. Petitioner Koon, an LAPD sergeant, arrived after the pursuit had ended and took command of the scene. Pet. App. 2a.

Officers ordered King and his two passengers to get out of the car and assume a felony prone position, *i.e.*, to lie face down on the ground, with arms and legs spread. King got out of the car, but he did not lie down. Eventually, King got down on his hands and knees but did not assume the felony prone position. Four officers, including Powell, attempted to force King into that position. King resisted and became combative, and the officers retreated. Koon fired two taser darts from an electric stun gun into King. Pet. App. 2a.

The events that followed were captured on a videotape made by George Holliday, which was an exhibit at trial (U.S. Exh. 20). As the videotape begins, it shows King rising from the ground in an attempt to escape. Powell struck King in the head with his baton. Powell and co-defendant Wind continued to strike King with their batons, and King fell to the ground. At 18 seconds on the tape, co-defendant Briseno put his hand on Powell's raised baton. From the 18th to the 30th second on the tape, King attempted to rise, and Powell and Wind again struck King with their batons. King then toppled to the ground. Pet. App. 2a-3a; U.S. Exh. 20.

From the 35th to the 51st second, Powell repeatedly struck King with his baton, as King lay on the ground. At approximately the 43d second, one of the blows fractured King's leg. At the 55th second, Powell struck King on the chest or upper abdomen, and King rolled onto his stomach and lay prone. At that point, the officers stepped back and observed King for approximately ten seconds. Powell began to reach for his handcuffs. Pet. App. 3a; U.S. Exh 20.

At 1:07 on the tape, Briseno stomped on King's upper back or neck. After King writhed reflexively, Powell and Wind hit King with a series of baton blows, and Wind kicked him in the upper thoracic or cervical area six times, until approximately 1:26. At approximately 1:29, King put his hands behind his neck and he was then handcuffed. Pet. App. 3a, 102a.

Powell used his hand-held radio to request an "RA [rescue ambulance]" for the "victim of a * * * *" and Koon yelled the word "beating." In response, Powell laughed and described King's injuries in the radio call as "numerous head wounds." 2/26/93 PM Tr. 17-18; 3/5/93 PM Tr. 62-65; 3/24/93 Tr. 85; Exh. 19. After the arrest, Powell sent messages to another officer over the Mobil Digital Terminal, saying "ooops" and "I havent beaten anyone this bad in a long time." Koon sent a message to the police station stating: "U[nit] just had a big time use of force. . . . Tased and beat the suspect of CHP pursuit big time." Pet. App. 3a.

King was taken to a hospital where he was treated for a fractured leg, multiple facial fractures, and numerous bruises and contusions. At the hospital, Powell said to King: "We played a little ball tonight, didn't we Rodney? * * * You know, we played a little ball, we played a little hardball tonight, we hit quite a few home runs. * * * Yes, we played a little ball and you lost and we won." Pet. App. 3a.

Koon, Powell, Briseno, and Wind were tried in state court in Simi Valley, California, on charges of assault with a deadly weapon and excessive use of force by a police officer. The four officers were acquitted on all charges, except for one count against Powell that resulted in a hung jury. Pet. App. 4a.

Thereafter, petitioners, along with Briseno and Wind, were indicted by a federal grand jury under 18 U.S.C.

242 for violation of King's constitutional rights under color of state law. Powell, Briseno, and Wind were charged with willfully using unreasonable force in arresting King. Koon was charged with willfully permitting the other officers to use unreasonable force during the arrest. The jury convicted petitioners and acquitted Briseno and Wind. Pet. App. 4a.[2]

2. The district court sentenced petitioners under Guidelines § 2H1.4 of the United States Sentencing Commission *Guidelines Manual* (Nov. 1992), which applies to violations of 18 U.S.C. 242. Pet. App. 96a, 108a. Section 2H1.4 prescribes a base offense level that is the greater of ten, or six plus the offense level of the underlying offense. The court found that the underlying offense for both petitioners was aggravated assault, for which Guidelines § 2A2.2(a) prescribes a base offense level of 15. Pet. App. 109a-112a. That led to a base offense level of 21. The court increased that offense level for both petitioners by four levels because a dangerous weapon was used (see Guidelines § 2A2.2(b)(2)(B)), and by two

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[2] At trial, the government contended that all blows after King toppled to the ground at 30 seconds on the videotape violated 18 U.S.C. 242. In rejecting Powell's challenge to the sufficiency of the evidence, the court of appeals determined that the evidence was sufficient to support the government's theory. Pet. App. 55a. At sentencing, however, the district court found that many of the blows after 30 seconds "may have been tortious," but because of King's slight movements and his failure to assume the felony prone position during that period, petitioners did not have the specific intent required for conviction under Section 242 at that point. *Id.* at 104a, 106a-107a. Rather, the district court found, the violation of 18 U.S.C. 242 did not begin until 1:07, after Briseno stomped King. *Id.* at 106a. In affirming that finding, the court of appeals stated that "[a]lthough we may not agree, the district court resolved [the] ambiguities [in the evidence] in favor of the defense," and "the government has not established clear error." *Id.* at 78a-79a.

levels because King had suffered bodily injury as a result of petitioners' unlawful conduct (see Guidelines § 2A2.2(b)(3)(A)). Pet. App. 112a-115a. The adjusted offense level was therefore 27. *Id.* at 115a, 118a. Because neither petitioner had a criminal record, they fell within criminal history category I. The sentencing range for an offense level of 27 and criminal history category I is 70 to 87 months' imprisonment. U.S.S.G. Ch. 5 Pt. A (Sentencing Table).

The district court, however, granted both petitioners a downward departure from the prescribed Guidelines range. It granted a three-level departure based on a combination of factors and a five-level departure based on victim misconduct. The departure yielded an offense level of 19, and a sentencing range of 30 to 37 months' imprisonment. Pet. App. 134a-135a. The court sentenced both petitioners to 30 months' imprisonment. *Id.* at 135a.

a. The district court based the three-level combination departure on (1) the additional punishment resulting from petitioners' job termination proceeding and susceptibility to abuse in prison; (2) the absence of a need to protect the public from further criminal activity by petitioners; and (3) the purported "specter of unfairness" resulting from successive state and federal prosecutions for the same conduct. Pet. App. 120a; see *id.* at 121a, 124a-131a.

With respect to the first factor, the court found that petitioners would face a job-termination proceeding, after which they would lose their positions as police officers, be disqualified from prospective employment in the field of law enforcement, and suffer the anguish and disgrace those deprivations entail. Pet. App. 127a-128a. The court also concluded that, because of the "widespread publicity and emotional outrage which have surrounded

this case," petitioners were "likely to be targets of abuse" in prison. *Id.* at 125a. As for the second factor, the court found that petitioners were not "violent, dangerous, or likely to engage in future criminal conduct," and that there was therefore "no reason to impose a sentence that reflects a need to protect the public from [them]." *Id.* at 129a. Finally, the court stated that successive state and federal prosecutions for the same conduct unfairly burdened petitioners. *Id.* at 130a. In the court's view, while the federal prosecution had not violated petitioners' constitutional rights, it had "raise[d] a specter of unfairness." *Ibid.* The court concluded that, although none of the three factors standing alone would justify a departure (*id.* at 120a), when "taken together," they did. *Id.* at 121a.

The court awarded the five-level downward departure pursuant to Guidelines § 5K2.10 (policy statement), which permits a departure "[i]f the victim's wrongful conduct contributed significantly to provoking the offense behavior." Pet. App. 57a, 121a-124a, 132a. The court acknowledged that, "by the time [petitioners'] conduct crossed the line to unlawfulness, Mr. King was no longer resisting arrest. He posed no objective threat, and the defendants had no reasonable perception of danger." *Id.* at 123a. The court believed that Section 5K2.10 was nonetheless applicable because, but for King's speeding, petitioners would never have been present at the scene, and but for King's initial wrongful conduct in resisting arrest and attempting to escape, no force would have been necessary in the first place, and the incident would not have occurred at all. *Id.* at 122a-123a.

The court also held that, because of the role that King's misconduct had played in the offense, petitioners' conduct did not fall within the "heartland" of offenses contemplated by the guidelines that apply to excessive

force cases. Pet. App. 123a. The court viewed cases in which state officials deliberately use excessive force, without any cause to initiate the use of force, as the heartland of Guidelines § 2H4.1. The court concluded that the Guidelines do not adequately account for the differences between such heartland cases and cases in which an official's use of force is lawful at the outset. Pet. App. 123a-124a.

3. The court of appeals affirmed petitioners' convictions, but vacated their sentences and remanded for resentencing. Pet. App. 1a-79a. The court of appeals reviewed de novo the question whether the district court had authority to depart from the Guidelines sentencing ranges, while reviewing the district court's factual findings only for clear error. *Id.* at 57a. The court held that a district court has legal authority to depart only when a proposed "mitigating" factor has not been adequately considered by the Sentencing Commission, see 18 U.S.C. 3553(b), Pet. App. 57a, and only when that ground is consistent with the sentencing purposes and structure of the Sentencing Reform Act of 1984, *id.* at 58a (citing 18 U.S.C. 3553(a) (court "shall impose a sentence sufficient" to comply with the purposes of retribution, deterrence, incapacitation, and rehabilitation). The court added that

> [a]though § 3553(b) does not define the term "aggravating or mitigating circumstance," the term does suggest a factor that constitutes a permissible basis for departure only if it speaks to the culpability of the defendant or the severity of the offense, or if it is otherwise related to some other congressionally-authorized legitimate sentencing concern.

Pet. App. 60a, quoting *United States* v. *Crippen*, 961 F.2d 882, 884 (9th Cir.), cert. denied, 113 S. Ct. 438 (1992) (emphasis deleted).

a. Applying that analysis, the court of appeals held that the district court erred in awarding the three-level departure based on a combination of three factors. Pet. App. 58a-69a. The court did not disagree with the district court's conclusion that several factors can sometimes be combined to form a basis for departure, even though no factor alone would warrant it. The court held, however, that each of the factors must still be examined to determine whether considering it as part of a mix is consistent with the structure and purposes of the Guidelines and the federal sentencing statutes. *Id.* at 58a-59a.

The court of appeals then held that none of the factors relied on by the district court formed a permissible component of a combination departure. The court concluded that the personal and professional consequences stemming from a criminal conviction are not permissible grounds for departure because they are "not tied to any penological purpose or legitimate sentencing concern expressed in the federal sentencing statutes." Pet. App. 62a. The sentences imposed under the Guidelines, the court explained, were not conceived to be the sole consequence of conviction for criminal offenses; collateral consequences such as job loss and social stigma are ordinary consequences of a criminal conviction. *Ibid.* Any attempt to separate collateral consequences that should serve as a ground for a departure from those that should not, the court noted, "would be boundless in the moral, social, and psychological examinations it required courts to make" and "can only lead to huge disparities," in contravention of "one of the overriding purposes of the Sentencing Guidelines." *Id.* at 63a. That factor

could also be used "consciously or unconsciously" as a way to take into account socio-economic status, "a factor that is *never* a permissible basis for departure." *Id.* at 63a.

The court of appeals held that susceptibility to abuse in prison by virtue of a person's status is also an impermissible factor to consider. Pet. App. 64a-66a. The court explained that such a departure ground is both "subjective and open-ended" and could be applied to numerous groups, such as gang members who may face increased abuse from members of a rival gang, police informants, or child abusers. *Id.* at 65a-66a. Noting that "the number of defendants who might qualify * * * is virtually unlimited," the court concluded that acceptance of that ground for a departure "would subvert the Guidelines' goal of reducing unwarranted disparities in sentencing." *Id.* at 66a.

The court of appeals next held that it was impermissible to consider the fact that petitioners are unlikely to engage in future unlawful conduct. Because the Commission has stated that the lower end of criminal history category I is set for an offender with no risk of recidivism, the court explained, that factor is already taken into account by the Guidelines. Pet. App. 67a-68a.

Finally, the court of appeals concluded that the district court's perception of a "specter of unfairness" arising from the successive state and federal prosecutions is not a permissible departure factor "because it speaks neither to the culpability of the defendant, the severity of the offense, nor to some other legitimate sentencing concern." Pet. App. 68a-69a. The court added that recognizing such a departure ground would conflict with the court's duty under 18 U.S.C. 3553(a)(2)(A) to impose a sentence that "[r]eflects the seriousness of the offense," and would undermine the Attorney General's determination that compelling federal interests warranted a second prosecution. *Id.* at 69a.

b. The court of appeals likewise held that the five-level departure for victim misconduct was not justified. The court explained that the district court's findings demonstrated that King's misconduct provoked only petitioners' initial lawful use of force, not their "offense behavior," as required by Guidelines § 5K2.10. By focusing on whether King's misconduct was a but-for cause of the unlawful conduct, rather than on whether that misconduct actually "provoked" the offense behavior, the district court had applied an incorrect legal standard. Pet. App. 70a-71a.

The court of appeals also concluded that the incident's volatility, and the fact that petitioners were justified in using force at its inception, did not remove the case from the "heartland" covered by Guidelines § 2H1.4. The court observed that in deciding whether a particular use of force is reasonable, *Graham* v. *Connor*, 490 U.S. 386, 396-397 (1989), expressly requires consideration of the fact that a police officer must often make split-second decisions about the amount of force required. That standard "strongly suggests that provocation by the victim in a situation where an officer must act quickly is typical—not unusual." Pet. App. 73a. The district court's view that such provocation takes a case out of the heartland, the court of appeals concluded, is particularly inapt in a criminal prosecution, in which the government must make the difficult showing that police officers "*willfully* came down on the wrong side of the *Graham* standard." *Ibid.*

4. The panel voted to deny rehearing, and the full court voted to deny the suggestions of rehearing en banc. Pet. App. 80a-81a. Judge Reinhardt, joined by eight other judges, dissented from the denial of rehearing en

banc on the sentencing issues. *Id.* at 81a-93a. The dissent argued that district courts should have considerable discretion to depart and that their decisions should be reviewed under a deferential standard. *Id.* at 88a-90a.

SUMMARY OF ARGUMENT

I. A. Congress enacted the Sentencing Reform Act of 1984 to eliminate what it viewed as intolerable disparities in sentences resulting from the unreviewable discretion exercised by individual district courts. It authorized the Sentencing Commission to establish sentencing ranges for defendants with similar criminal histories and similar offense conduct that would be binding on the courts, and it narrowly limited the circumstances in which courts may depart from those sentencing ranges. To depart downward from the applicable sentencing range, there must be a "mitigating" factor that has not been adequately considered by the Commission. 18 U.S.C. 3553(b). All departures must also be consistent with the purposes of sentencing stated in 18 U.S.C. 3553(a)(2) (retribution, deterrence, incapacitation, and rehabilitation). A crucial element of the federal sentencing scheme, not present in the prior system, is appellate review of sentences to enforce those limitations and to protect against unwarranted disparities arising from the differing sentencing approaches of individual district judges.

B. The language, structure, and purposes of the Sentencing Reform Act show that Congress intended courts of appeals to exercise de novo review over the validity of a ground for departure. The statute requires appellate courts to accept district court findings of fact unless they are clearly erroneous, and to give "due deference to a district court's application of the guidelines to the facts." 18 U.S.C. 3742(e). The logical inference is that Congress

intended reviewing courts to undertake de novo review of a district court determination that a factor is a legally permissible ground on which to depart. A de novo standard is consistent with the traditional plenary review of legal issues. The question whether the Commission has adequately considered a factor is essentially a matter of Guidelines interpretation, and the question whether a factor is consistent with the statutory sentencing goals is essentially a matter of explicating the statute. Both questions are therefore legal ones fit for a de novo standard.

The legislative history of the Sentencing Reform Act also supports de novo review. It shows that Congress contemplated that appellate courts would develop case law on departure grounds and that they would review legal issues de novo. That standard has its usual law-clarifying benefits, because departure decisions present recurring issues, and plenary review fosters a consistent and coherent body of departure law. De novo review is also essential to achieve Congress's goal of preventing unwarranted disparities in sentencing. Departures are potentially a huge loophole in Congress's sentencing scheme. Failure to apply close appellate oversight could lead to a return of disparate sentencing practices that Congress sought to replace.

II. The district court in this case relied on a variety of factors to depart downward by a total of eight levels from the Guidelines range. None of those factors constituted a legally permissible basis for departure.

A. All of the bases for the district court's three-level departure are impermissible ones. Job loss and its attendant consequences are in the heartland of excessive force cases. Moreover, because there is no judicially manageable standard for deciding which collateral consequences of conviction warrant a departure, acceptance of that

general ground would invite, and inevitably produce, unwarranted disparities in sentencing. It would also lead to effects that are indistinguishable from sentencing based on socio-economic status, a prohibited factor under the Act and Guidelines.

Unusual susceptibility to abuse in prison is also an impermissible factor. The degree of a defendant's vulnerability is entirely subjective, and the number of potential defendants who could claim unusual vulnerability is virtually unlimited. Permitting a downward departure on that ground would thus lead to unwarranted disparities. The Bureau of Prisons has a constitutional responsibility to protect persons it knows are unusually vulnerable to assault, and courts may not assume that it will not be fulfilled.

Nor is the likelihood that a defendant will not commit crime in the future a valid departure consideration; that factor is already taken into account in the defendant's criminal history category. While the Commission has authorized a departure when a defendant's criminal history category overstates the likelihood of recidivism, it has prohibited a departure on that basis below the bottom of criminal history category I.

Finally, this Court's double jeopardy decisions conclusively establish that there is no legally cognizable unfairness from successive state and federal prosecutions for the same conduct. Acceptance of successive prosecution as a departure ground would undermine the Attorney General's determination that compelling federal interests justified the prosecution in this case.

Because none of the departure grounds discussed above is permissible, a departure based on all of those grounds combined is also impermissible.

B. The district court's five-level departure for victim misconduct was also unwarranted. Under Guidelines

§ 5K2.10, victim misconduct must be a *motivating* factor for the offense behavior, not merely a but-for cause of it. The district court's findings, however, establish only that King's conduct provoked the incident itself and the initial lawful use of force; King's conduct did not provoke the offense behavior as required by Section 5K2.10. The district court's application of Section 5K2.10 therefore rests on an erroneous construction of the Guidelines.

Further, ordinary victim misconduct lies in the heartland of excessive force cases. The legal standard for determining whether an official used constitutionally excessive force is framed to account for victim misconduct. The requirement in a criminal case that the government prove that a defendant has acted willfully in using unreasonable force reinforces the conclusion that ordinary victim misconduct is not a mitigating factor.

ARGUMENT

I. A DISTRICT COURT'S DETERMINATION THAT A PARTICULAR FACTOR PROVIDES A LEGALLY PERMISSIBLE BASIS FOR DEPARTURE IS SUBJECT TO DE NOVO APPELLATE REVIEW

In the federal system, sentencing is governed by the Sentencing Reform Act of 1984, which requires a district court to impose a sentence within the applicable range under the Sentencing Guidelines unless there exists an aggravating or mitigating circumstance of a kind or to a degree that the Sentencing Commission did not adequately consider. Even if the Commission has not adequately considered a factor, a downward departure is permissible only when it is a "mitigating" factor, consistent with the purposes of sentencing identified in 18 U.S.C. 3553(a)(2), *i.e.*, retribution, deterrence, incapacitation, and rehabilitation. The question whether a particu-

lar departure ground satisfies those statutory requirements is subject to de novo appellate review.

A. Congress Intended Appellate Review To Be A Principal Check Against Unjustified Departures

In order to resolve the question presented in this case, it is necessary to understand the background and structure of the Sentencing Reform Act of 1984 and the Sentencing Commission's Guidelines. The Sentencing Reform Act responded to the widespread perception that federal sentences exhibited "shameful disparity." S. Rep. No. 225, 98th Cong., 1st Sess. 65 (1983); see *Mistretta* v. *United States*, 488 U.S. 361, 365-366 (1989). As the Senate Judiciary Committee explained, the disparity could be traced directly to the "unfettered discretion" the law conferred on district judges. S. Rep. No. 225 at 38. Without sentencing standards or review procedures, "each judge [was] left to apply his own notions of the purposes of sentencing." *Ibid.* The consequence was that "every day federal judges mete[d] out an unjustifiably wide range of sentences to offenders with similar histories, convicted of similar crimes, committed under similar circumstances." *Ibid.* Congress's solution was the Sentencing Reform Act, which created "sweeping reforms" in the federal sentencing process. *Mistretta*, 488 U.S. at 366.

The statutory framework for departures: The Act created the United States Sentencing Commission, empowered the Commission to devise guidelines for sentencing, and made the Commission's guidelines binding on the courts. *Mistretta*, 488 U.S. at 361. Acting under that statutory authority, the Commission has issued guidelines that set sentencing ranges on the basis of the offender's conduct and criminal history category. See, *e.g.*, U.S. Sentencing Commission, *Guidelines Manual* (Nov. 1994); *Nichols* v. *United States*, 114 S. Ct. 1921, 1924 n.3 (1994).

The Sentencing Reform Act carefully limits the authority of courts to depart from the sentencing ranges prescribed by the Commission's guidelines. A court "shall impose a sentence of the kind, and within the range" prescribed by the Guidelines "unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." 18 U.S.C. 3553(b). In determining whether the Commission adequately considered a circumstance, "the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission." 18 U.S.C. 3553(b). The Senate Committee Report reveals an intention that "most cases will result in sentences within the guideline range." S. Rep. No. 225 at 52. While the departure standard left some "flexibility" in sentencing where the guidelines did not address a situation, *id.* at 78, Congress rejected an amendment that would have given wide-open discretion to district courts to depart "whenever a judge determined that the characteristics of the offender or the circumstances of the offense warranted deviation," regardless of the consideration of that factor by the Commission. *Id.* at 79.[3]

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[3] In the course of debate on clarifying amendments to Section 3553(b), see Pub. L. No. 100-182, § 3, 101 Stat. 1266 (1987), several Senators emphasized that departures are reserved for a "rare and particularly unusual" case. 133 Cong. Rec. 33,109 (1987) (statement of Sen. Hatch). If the departure standard did not strictly limit departures to exceptional cases, "there [was] a danger that trial judges [would] be able to depart from the guidelines too freely, and such unwarranted

The Guidelines' treatment of departures: In keeping with Congress's intent, the Commission sought to narrow the circumstances in which a departure would be appropriate. The Guidelines, "offense by offense, seek to take account of those factors that the Commission's data indicate made a significant difference in pre-guidelines sentencing practices." Sentencing Guidelines Ch. 1, Pt. A (Intro.) 4(b) (policy statement). In addition, the Commission issued policy statements indicating that some factors cannot be grounds for any sentencing determination: *e.g.* race, sex, national origin, creed, religion, and socio-economic status (§ 5H1.10). It also stated that certain factors "are not ordinarily relevant to the determination of whether a sentence should be outside the applicable guideline range" (Sentencing Guidelines Ch. 5, Pt. H, Introductory commentary): *e.g.* age (§ 5H1.1); education and vocational skills (§ 5H1.2); physical condition or appearance (§ 5H1.4); employment record (§ 5H1.5); family responsibilities (§ 5H1.6); and prior good works (§ 5H1.11). And it identified certain factors that may warrant a departure: *e.g.* victim conduct (§ 5K2.10); coercion and duress (§ 5K2.12); and diminished capacity (§ 5K2.13).

More generally, the Commission stated that each of the offense guidelines takes into account all conduct that occurs in its "heartland." Sentencing Guidelines Ch. 1, Pt. A (Intro.) 4(b) (policy statement). The Commission intended for courts "to treat each guideline as carving out a 'heartland,' a set of typical cases embodying the conduct that each guideline describes." *Ibid.* A departure is permissible only "[w]hen a court finds an atypical

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departures would undermine the core function of the guidelines, which is to reduce disparity." *Ibid.*; accord *id.* at 33,108-33,109 (joint statement of Senators Biden, Thurmond, Kennedy, and Hatch).

case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm." *Ibid.* The Commission did "not intend to limit the kinds of factors, whether or not mentioned anywhere else in the guidelines, that could constitute grounds for departure in an unusual case." *Ibid.* But because the Commission sought to take into account the factors that experience had shown made a significant difference in sentencing, it anticipated that such departures would be "highly infrequent." *Ibid.*

District court departure decisions: In order for a case to be a candidate for departure, a district court must determine that the Commission has not given adequate consideration to a particular aggravating or mitigating circumstance. If the court finds that such a factor takes a case outside of a guideline's "heartland," it "may then go on to consider, in light of the sentencing system's purposes, *see* 18 U.S.C. § 3553(a), (and the Guidelines themselves) whether or not the 'unusual' features of the case justify departure." *United States* v. *Rivera*, 994 F.2d 942, 947 (1st Cir. 1993) (Breyer, C.J.); see also *id.* at 949. Section 3553(a) provides that "[t]he court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection." Paragraph (2), in turn, provides that the sentence imposed must (A) "reflect the seriousness of the offense, * * * promote respect for the law, and provide just punishment for the offense," (B) "afford adequate deterrence to criminal conduct," (C) "protect the public from further crimes of the defendant," and (D) "provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner." 18 U.S.C. 3553(a)(2). That provision was intended to assure for the first time that the federal criminal justice system would

adhere to a consistent sentencing philosophy. S. Rep. No. 225 at 59-60; see also *id*. at 75-76. Section 3553(a) further directs the court "to consider the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. 3553(a)(6). That subsection "requires judges to avoid unwarranted disparity in applying the guidelines and particularly in deciding when it is desirable to sentence outside the guidelines." S. Rep. No. 225 at 78.

Appellate review: A "critical" component of preventing unwarranted sentencing disparities is the provision for appellate review of departures, at the behest of both the defendant and the government. S. Rep. No. 225 at 151. Under 18 U.S.C. 3742(a) and (b), either the defendant or the government may appeal a sentence that "was imposed as a result of an incorrect application of the sentencing guidelines." A district court's reliance on an invalid departure ground in imposing a sentence constitutes an "incorrect application" of the sentencing guidelines within the meaning of those provisions. *Williams* v. *United States*, 503 U.S. 193, 200 (1992). A sentence must also be set aside if it is "outside the guideline range, and is unreasonable." 18 U.S.C. 3742(e)(3), (f)(2); *Williams*, 503 U.S. at 202.

While a discretionary decision by a district court not to depart from the Guidelines is not appealable, the Act permits the government to appeal a downward departure, and it permits a defendant to appeal an upward one. 18 U.S.C. 3742(a) and (b). That appellate review structure was designed by Congress as part of "an effort to achieve greater uniformity" in sentencing, S. Rep. No. 225 at 65, and "to reduce materially any remaining unwarranted disparity" after application of the guide-

lines, *id*. at 86.[4] Government appeals of departure decisions were of particular importance. As the Senate Report explains, "it is essential that there be a mechanism to appeal on behalf of the public those sentences which fall below the applicable guidelines." *Id*. at 65. The Report further explains that "[b]ecause sentencing judges retain the flexibility of sentencing outside the guidelines, it is inevitable that some of the sentences outside the guidelines will appear to be too severe or too lenient. Appellate review of sentences is essential to assure that the guidelines are applied properly and to provide case law development of the appropriate reasons for sentencing outside the guidelines." *Id*. at 151. By providing for appeals by both parties, the Act laid the groundwork for "the development of a principled and balanced body of appellate case law" on departures. *Id*. at 151.[5]

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[4] Before the Sentencing Reform Act, this Court had noted the strong and vocal criticism that the federal sentencing system invited arbitrary decisions, and, in rejecting a double jeopardy challenge to the government's appeal of a sentence, observed that "[a]ppellate review creates a check upon this unlimited power, and should lead to a greater degree of consistency in sentencing." *United States* v. *DiFrancesco*, 449 U.S. 117, 143 (1980). The Senate Report quoted this language in explaining the validity of the review procedures it prescribed. S. Rep. No. 225 at 153.

[5] The case law was, in turn, expected to "assist the Sentencing Commission in refining the sentencing guidelines as the need arises. For example, if the courts found that a particular offense or offender characteristic that was not considered, or adequately reflected, in formulation of the guidelines was an appropriate reason for imposing sentences that differed from those recommended in the guidelines, the Sentencing Commission might wish to consider amending the guidelines to reflect the factor." S. Rep. No. 225 at 151.

B. Congress Intended Appellate Courts To Exercise De Novo Review Of The Validity Of A Departure Ground

The text, structure, and design of the Sentencing Reform Act uniformly point to the application of a de novo, rather than deferential, standard of review of the question whether a departure ground relied on by a district court is a permissible one, *i.e.* whether it was adequately considered by the Commission within the meaning of 18 U.S.C. 3553(b) and is an "aggravating or mitigating" factor consistent with the purposes of sentencing in 18 U.S.C. 3553(a).

1. *Statutory text*. The text of the appellate review provisions strongly supports de novo review. In 1988, Congress amended the Act to provide that in appeals of Guidelines rulings:

> The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and shall give due deference to the district court's application of the guidelines to the facts.

18 U.S.C. 3742(e). Congress thus expressly required the usual deference to a district court's findings of fact, and provided for "due deference" to its application of the guidelines to the facts. Congress's express provision for a measure of deference on those two appellate issues strongly implies that it envisioned that courts would conduct de novo review on the threshold legal question whether the ground for departure relied on by the district court is a permissible one.

De novo review of the validity of a particular departure ground accords with the general rule that legal

questions are reviewed de novo. See *Salve Regina College* v. *Russell*, 499 U.S. 225, 231-233 (1991); *Pierce* v. *Underwood*, 487 U.S. 552, 558 (1988); see *First Options of Chicago, Inc.* v. *Kaplan*, 115 S. Ct. 1920, 1926 (1995). As the Court has noted, "[i]ndependent appellate review of legal issues best serves the dual goals of doctrinal coherence and economy of judicial administration." *Salve Regina*, 499 U.S. at 231. The issues of whether a departure ground was adequately considered by the Commission and whether it is consistent with the requirements of Section 3553(a) are both legal in character.

In determining whether the Commission has adequately considered a factor, a court must decide whether the Commission has categorized the factor as a prohibited ground for departure, a generally inappropriate basis for departure, or a generally permissible one. It must also decide whether the factor has already been adequately taken into account by the Commission in framing the "heartland" of the applicable offense guidelines. In resolving those issues, a court may not consider evidentiary proof. By statute, a court must resolve those issues "only" by considering "the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission." 18 U.S.C. 3553(b). Determining whether the Commission has adequately considered a factor is therefore essentially a matter of interpreting the Commission's guidelines. For that reason, it is an issue of law, subject to de novo review. As Justice Souter has explained, because the question of adequate consideration "goes essentially to the Commission's intentions," and turns "not on an evidentiary record," but "on documented administrative history and commentary," it is "an issue of law subject to customary appellate review."

See *Burns* v. *United States*, 501 U.S. 129, 151-152 & n.6 (1991) (Souter, J., dissenting).[6]

For similar reasons, the question whether a departure ground is consistent with the purposes of sentencing described in 18 U.S.C. 3553(a) is also an issue of law. As the text of Section 3553(a) makes clear, compliance with its requirements is an independent statutory duty. See 18 U.S.C. 3553(a) ("court *shall* impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection") (emphasis added). Thus, even when a factor has not been taken into account by the Commission, a departure is permissible only if it promotes the four stated purposes of sentencing (retribution, deterrence, incapacitation, and rehabilitation, 18 U.S.C. 3553(a)), and would not lead to unwarranted sentencing disparities between defendants with similar records found guilty of similar conduct (18 U.S.C. 3553(a)(6)).

The purposes of sentencing set forth in Section 3553(a) also shed light on whether a factor is "aggravating" or "mitigating" and whether a circumstance "should result" in a departure within the meaning of Section 3553(b). See *United States* v. *Clark*, 8 F.3d 839, 842 (D.C. Cir. 1993) ("To qualify as 'mitigating,' a circumstance must be linked to one of the stated purposes of sentencing, *i.e.*, just punishment, adequate deterrence, public protection, or rehabilitation"). *United States* v. *Crippen*, 961 F.2d 882, 884 (9th Cir.), cert. denied, 113 S. Ct. 438 (1992);

[6] In *Burns*, the Court held that a district court that intends to depart from the Guidelines range based on a factor not previously identified by the presentence report must give reasonable notice to the parties of that intention. 501 U.S. at 138-139. The majority did not reach or address the issue discussed by Justice Souter of how a court should determine whether the Commission took adequate account of a particular factor in fashioning the Guidelines.

United States v. *Smith*, 14 F.3d 662, 666 (1st Cir. 1994) (to decide whether a circumstance not taken into account by the Commission should result in a departure "a court should look to the sentencing system's purposes"); see also *United States* v. *Mogel*, 956 F.2d 1555, 1563 (11th Cir.), ("[a]ll departures must be firmly grounded in one or more of the relevant penological goals underlying the Guidelines") cert. denied, 113 S. Ct. 167 (1992). Indeed, the core meaning of "mitigating" is linked to purposes of sentencing that primarily relate to the defendant's culpability or the seriousness of the offense. See *Black's Law Dictionary*, 1002 (6th ed. 1990) (defining "mitigating circumstances" as "[s]uch as do not constitute a justification or excuse for the offense in question, but which, in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability").[7]

[7] As the court of appeals in this case concluded (Pet. App. 60a-61a & n.33), the question whether a departure ground is consistent with Section 3553(a) will often depend on whether it relates to the "culpability of the defendant or the severity of the offense." All of the departure factors encouraged by the Commission fall into one of those two categories (*e.g.*, death, physical injury, and unlawful restraint bear on the seriousness of the offense, while lesser harms, coercion, and diminished capacity bear on the culpability of the defendant). The Commission has also expressly discouraged departures based on certain factors that do not relate to the culpability of the defendant or the seriousness of the offense (*e.g.*, family circumstances, physical infirmity). That does not mean that factors that are unrelated to the defendant's culpability or the seriousness of the offense can never constitute grounds for departure. See Pet. App. 61a n.33. It does mean, however, that such factors should be carefully scrutinized to insure that they promote one of the purposes of sentencing expressed in the Sentencing Reform Act and would not lead to unwarranted sentencing disparities.

The application of the purposes listed in Section 3553(a), both as an independent statutory requirement and as the source for interpreting the terms "mitigating" and "should result" in Section 3553(b), requires courts to measure proposed departure grounds against legal benchmarks that govern the imposition of sentences.[8] Departures from the Guidelines therefore involve issues of law that are subject to a plenary standard of appellate review. *United States* v. *Lira-Barraza*, 941 F.2d 745, 746 (9th Cir. 1991) (en banc).

2. *Legislative history.* The legislative history of the Sentencing Reform Act also supports the conclusion that the legal validity of a departure ground is subject to de novo review. The Senate Report states that "[a]ppellate review of sentences is essential to assure that the guidelines are applied properly and to provide case law development of the appropriate reasons for sentencing outside the guidelines. This in turn will assist the Sentencing Commission in refining the sentencing guidelines as the need arises." S. Rep. No. 225 at 151. De novo review is best suited to those tasks.

The Sentencing Reform Act originally contained no provision defining the applicable standards for appellate review. In 1988, Congress added to 18 U.S.C. 3742(e) the provision requiring courts of appeals to give "due deference" in reviewing the application of the guidelines to the facts. 102 Stat. 4417. The House section-by section analysis explains that when a party appeals on the

[8] The reviewing court must also consider the purposes of sentencing in evaluating the reasonableness of a departure under 18 U.S.C. 3742(e)(3) (requiring court of appeals to determine whether a sentence is "outside the applicable guideline range, and is unreasonable," with regard for (A) "the factors to be considered in imposing a sentence," as set forth in 18 U.S.C. 3553(a), and (B) the district court's stated reasons for the sentence).

ground that the district court has incorrectly applied the guidelines, findings of fact are reviewed for clear error, but "[t]he court of appeals will scrutinize more closely a district court determination of a legal question, applying a *de novo* standard." 134 Cong. Rec. 33,303 (1988). The section-by-section analysis further explains that the new due deference standard was intended to give appellate courts "flexibility" in reviewing the application of the guidelines to the facts. If the particular determination more closely resembles a factual issue, something approaching clear error review would apply. On the other hand, if the issue more closely resembles a legal issue, something approaching de novo review would apply. *Id.* at 33,303. Those statements reinforce the conclusion that de novo review is appropriate for the legal question of whether a departure ground is permissible in the first place.

3. *Institutional advantages.* De novo review of departure grounds also "produce[s] the normal law-clarifying benefits that come from an appellate decision on a question of law." *Pierce*, 487 U.S. at 561; *see Thompson* v. *Keohane*, No. 94-6615, (Nov. 29, 1995), slip op. 16 ("the law declaration aspect of independent review potentially may * * * unify precedent and stabilize the law"; holding that "in custody" determinations for purposes of *Miranda* are subject to independent, rather than deferential, federal review in habeas corpus proceedings). The body of decisional law in the courts of appeals illustrates the recurring issues faced in the departure context and the courts of appeals' distillation of general legal principles.

In examining whether particular departure factors accord with the purposes of sentencing listed in 18 U.S.C. 3553(a), courts of appeals have repeatedly resolved legal issues that turn on identifiable and recurrent principles.

For example, courts have often encountered claims that various forms of alleged government misconduct constituted a valid basis for a downward departure. That claim has universally been rejected, on the basis that, while the Commission had not considered such an unusual circumstance, recognizing that ground for departure would "run[] counter to a primary purpose of the sentencing system, which is to deter criminal conduct." See *United States* v. *Smith*, 14 F.3d 662, 666 (1st Cir. 1994) (fact that INS gave defendant incorrect information about the criminal penalty he would face upon illegal reentry did not justify a downward departure); accord *United States* v. *Gomez-Villa*, 59 F.3d 1199, 1202 (11th Cir. 1995), petition for cert. pending, No. 95-6028; *United States* v. *Ullyses-Salazar*, 28 F.3d 932, 938 (9th Cir. 1994), cert. denied, 115 S. Ct. 1367 (1995); *United States* v. *Agubata*, 60 F.3d 1081, 1084 (4th Cir. 1995), petition for cert. pending, No. 95-6524; *United States* v. *Cruz-Flores*, 56 F.3d 461, 464 (2d Cir. 1995); see also *United States* v. *Pacheco-Osuna*, 23 F.3d 269, 272 (9th Cir. 1994) (Fourth Amendment violation); *United States* v. *Williams*, 978 F.2d 1133, 1136 (9th Cir.) (perjury before a grand jury), cert. denied, 113 S. Ct. 1606 (1992); *United States* v. *Valencia-Lucena*, 925 F.2d 506, 515 (1st Cir. 1991) (same as *Williams*).

The determination of whether a particular factor is within the "heartland" likewise benefits from de novo review. For example, in *United States* v. *Rivera*, 994 F.2d 942, 945 (1st Cir. 1993), the district court sentenced the defendant to probation rather than to prison, as the Guidelines dictated, in order to allow him to continue working and thereby make restitution. The First Circuit, "deciding the question as a pure matter of law," reversed. It held that "the embezzlement guidelines encompass, within their 'heartland,' embezzlement accom-

panied by *normal* restitution needs and practicalities," and thus that such needs cannot justify a downward departure. *Id.* at 955. The court explained "that the embezzlement guidelines are written for ordinary cases of embezzlement, that restitution is called for in many such cases, and that prison terms often make restitution somewhat more difficult to achieve." *Ibid.* The court also noted that recognizing such a departure ground would run contrary to the Commission's intent to equalize punishments for white collar and blue collar crimes. *Ibid.* That resolution is consistent with the holdings of other courts. See *id.* at 956 (citing *United States* v. *Harpst*, 949 F.2d 860, 863 (6th Cir. 1991) and *United States* v. *Bolden*, 889 F.2d 1336, 1340 (4th Cir. 1989)). Other heartland issues have been similarly resolved through application of de novo review. See, *e.g.*, *United States* v. *Rutana*, 932 F.2d 1155, 1158 (6th Cir.) (fact that the imprisonment of an industrial polluter would work a hardship on the defendant's employees and their families did not take the case outside the heartland of the industrial pollution guidelines), cert. denied, 502 U.S. 907 (1991).

The application of de novo review has enabled courts of appeals to fulfill the expectation voiced in the legislative history that sentencing appeals would promote "the development of a principled and balanced body of appellate case law." S. Rep. No. 225 at 151. Courts have ruled that the following are not permissible grounds for a departure: the possibility of deportation following a sentence, *United States* v. *Restrepo*, 999 F.2d 640, 646-647 (2d Cir.), cert. denied, 114 S. Ct. 405 (1993); the loss of good time credits resulting from the offense conduct, *United States* v. *Newby*, 11 F.3d 1143, 1148-1149 (3d Cir. 1993), cert. denied, 114 S. Ct. 1841 (1994); equalizing a sentence with that of a co-defendant, *United States* v.

Wogan, 938 F.2d 1446, 1448 (1st Cir.), cert. denied, 502 U.S. 969 (1991); the shooting of the defendant by a third-party, *United States* v. *Mason*, 966 F.2d 1488, 1494 (D.C. Cir.), cert. denied, 113 S. Ct. 829 (1992); the imprisonment of a spouse, *United States* v. *Pozzy*, 902 F.2d 133, 139 (1st Cir.), cert. denied, 498 U.S. 943 (1990); the absence of any need to incarcerate, *United States* v. *Brewer*, 899 F.2d 503, 509-510 (6th Cir.), cert. denied, 498 U.S. 844 (1990); a jury recommendation for leniency, *United States* v. *Mickens*, 926 F.2d 1323, 1333 (2d Cir.), cert. denied, 502 U.S. 1060 (1991); a violation of state speedy trial requirements leading to federal prosecution for the same conduct, *United States* v. *Deitz*, 991 F.2d 443, 445-446 (8th Cir. 1993); the community perception that the sentence is excessive, *United States* v. *Hadaway*, 998 F.2d 917, 920-921 (11th Cir. 1993); the alleged weakness of the government's case, *United States* v. *Brooks*, 966 F.2d at 1505 (D.C. Cir. 1992); and the prosecutor's discretion to bring a case in federal rather than local court, *United States* v. *Clark*, 8 F.3d 839, 842-843 (D.C. Cir. 1993). Those decisions show that de novo review furthers the development of a coherent body of law concerning when it is legally permissible to depart from the Guidelines.

4. *Statutory purposes.* De novo review is also essential to serve Congress's goal of eliminating unwarranted disparity in sentencing. The disparities that Congress sought to remedy through the Sentencing Reform Act stemmed principally from the widely varying sentencing philosophies of district judges who exercised discretion in sentencing without any check in law or through appellate review. The review of departures under a deferential standard would invite a return to such individualized sentencing decisions.

Disparity in sentencing is particularly problematic when it results from the different interpretations of the law held by individual district judges. It is one thing to acknowledge that a recognized departure ground may be applied to particular facts in varying ways from courtroom to courtroom. But it is another thing altogether to delegate to district courts the legal power to make different decisions about what constitutes a permissible departure ground. The application of deferential, rather than de novo, review would yield precisely that result. Inherent in the concept of deference is that two different judges looking at the same factor can reach opposite conclusions about whether it is a legally permissible basis for departure. Absent de novo review, in many circumstances, each of those contrary conclusions would have to be affirmed.

That consequence cannot be reconciled with the purposes of the Sentencing Reform Act. Government misconduct either is or is not a basis for departure; ordinary restitution needs either are or are not a permissible basis for departure in an embezzlement case; the loss of jobs suffered by employees either is or is not a valid basis for departure in an industrial pollution case. Under the system created by Congress, they cannot be both. The same is true of the departure grounds involved in this case. Congress did not intend to create a sentencing system in which job loss, unusual susceptibility to abuse in prison, unlikelihood of recidivism, dual prosecution, and ordinary provocation in an excessive force case would be legally permissible grounds for a departure in some courtrooms, but not others. De novo review is necessary to prevent that form of disparity from becoming routine in the federal sentencing system.

Of course, through its power to revise the guidelines, the Commission plays a central role in ensuring even-

handed sentencing determinations. See *Braxton* v. *United States*, 500 U.S. 344, 348 (1991); 28 U.S.C. 994(*o*). But the Commission's function is complemented, not undercut, by plenary appellate review of the permissibility of particular grounds for departure. While the Commission monitors the work product of both district courts and courts of appeals, the sheer volume of district court departure decisions, and the absence of a complete legal analysis in many of those decisions, greatly diminishes the utility of those results as raw material for the Commission to analyze. In contrast, the Commission may readily consult court of appeals decisions, benefit from the detailed and thorough application of the law to the facts in written opinions, and revise the Guidelines in response to factors that emerge as warranting clarification on a nationwide level. The Commission in fact pays particular attention to the work product of the appellate courts, including by systematically tracking grounds for departure decisions.[9] Congress's goal of eliminating unwarranted disparities is therefore best realized by de novo review of the legal validity of a departure ground.

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[9] See U.S. Sentencing Commission, *Annual Report* 13-19 (1994) (tables and discussion of approved and disapproved departure factors at the appellate level). The Commission's review of appellate court decisions is, for many reasons, a more searching and complex endeavor than its tracking of district court decisions. See *id.* at 133, 135 (describing the "collaborative effort of the Commission's legal, monitoring, and policy analysis staffs" in reviewing all published and unpublished appellate decisions involving sentencing issues); cf. *id.* at 82 & n.1 (noting that, exclusive of downward departures for substantial assistance, 29,971 district court sentencing determinations were reported to the Commission, 2,932 of which involved downward departures; providing a summary table of major grounds cited).

C. The Arguments Against De Novo Review Are Unsound

Petitioners offer four arguments in favor of deferential review: the intention of the Sentencing Reform Act to leave some discretion in the hands of sentencing judges; the historic tradition in favor of sentencing discretion; the supposed superior perspective of district courts on departure decisions; and the resistance of departure decisions to useful legal generalizations. Koon Br. 22-37; see Powell Br. 33-36. Those arguments do not justify deferential review, and in many respects are at odds with the central purposes and provisions of the Act.

Congress did leave district courts with some sentencing discretion, and it did instruct appellate courts to give "due deference" to a district court's application of the guidelines to the facts. See 18 U.S.C. 3742(e). But it does not follow that Congress also intended to give district courts deference in deciding whether a departure ground is legally permissible. Koon Br. 22-33. As we have explained, see pp. 16-21, *supra*, the central aim of the Sentencing Reform Act was to cabin sentencing discretion in order to eliminate unwarranted disparities, and appellate review was instituted as a principal means to attain that goal.

Likewise, the long history of appellate court deference to district court sentencing decisions, Koon Br. 33-35, does not counsel in favor of a highly deferential standard of review for departure decisions. Koon relies (Br. 34-25) on this Court's statements in *Williams* v. *United States*, 503 U.S. 193, 205 (1992), that the Act "did not alter a court of appeals' traditional deference to a district court's exercise of sentencing discretion," and "[t]he selection of the appropriate sentence from within the guideline range, as well as the decision to depart from

the range in certain circumstances, are decisions that are left solely to the sentencing court." Those statements are simply a shorthand way of acknowledging that the decision to depart is discretionary when there is a permissible ground for departure; only then is a departure decision "solely" the district court's to make. 503 U.S. at 205. As *Williams* itself made clear, the district court may be reversed as a matter of law for an "incorrect application of the Guidelines," *i.e.* when it "depart[s] from the applicable sentencing ranged based on a factor that the Commission has already fully considered in establishing the guideline range." *Id.* at 200.

Selecting the appropriate standard of review often depends on which judicial actor is institutionally better suited to make the determination in question. See *First Options*, 115 S. Ct. at 1926. Contrary to Koon's contention, Br. 35-36, however, the question whether a ground for departure is permissible does not turn on the credibility of witnesses or a judge's feel for the case, factors that favor deferential review. Rather, answering that question turns primarily on interpretation of the Guidelines and explication of Section 3553(a). Appellate courts are therefore better positioned to decide whether a departure ground is legally permissible.

Koon errs in contending (Br. 36-37) that departure decisions are so fact-specific as to resist meaningful generalization, and that de novo review is therefore inappropriate. In contrast to the need for district court "supervision of litigation" on fact-bound issues, which supported abuse-of-discretion review in *Pierce*, 487 U.S. at 558 n.1, and *Cooter & Gell* v. *Hartmax Corp.*, 496 U.S. 384, 401-405 (1990), departures from the Guidelines do tend to fall into categories involving recurring questions.

See pp. 27-30, *supra*. Reviewing those issues de novo furthers the development of a coherent body of law.

Although Koon has framed the question before this Court (Koon Br. (i)) as a choice between de novo review or "the deferential standard set forth in *United States* v. *Rivera*, 994 F.2d 942 (1st Cir. 1993)," the level of deference proposed by Koon appears to go far beyond the approach outlined in *Rivera*. In *Rivera*, the court of appeals recognized that "plenary review is appropriate where the question on review is simply whether or not the allegedly special circumstances (i.e., the reasons for departure) are of the 'kind' that the Guidelines, in principle, permit the district court to consider at all." 994 F.2d at 951. The court also indicated that plenary review is appropriate when the issue is the "quintessentially legal" one of interpreting the language of a guideline, in light of its underlying purpose, to delineate its "heartland." *Ibid.* *Rivera* went on to hold only that review should be deferential, rather than plenary, when a district court makes a determination "of whether (and the extent to which) given circumstances make a case 'unusual' or 'not ordinary.'" *Id.* at 952.

The question whether a court of appeals should defer to a district court's determinations of "unusualness" for purposes of departure is not presented by the facts of this case, because the grounds cited by the district court are invalid as a matter of law.[10] Nevertheless, in our view,

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[10] Koon argues (Br. 27) that the only gateway that a permissible departure must pass through is the Sentencing Guidelines themselves (*i.e.*, that any factor that takes a case out of the "heartland" and is not prohibited by the Guidelines may form a permissible basis for departure). Some language in *Rivera* supports that analysis (see 994 F.2d at 947), although the First Circuit itself has not read *Rivera* to bar de novo review of departure factors for consistency with the statute. See *United States* v. *Smith*, 14 F.3d 662, 666 (1st Cir. 1994) (conducting

determinations on issues of recurring importance, such as whether sole custody of young children constitutes unusual family circumstances, are best reviewed de novo. Whatever comparative advantages the district court may have in its " 'feel' for the unique circumstances of the particular case before it" and in its familiarity with "ordinary" Guidelines cases, *Rivera*, 994 F.2d at 951, those advantages are more than offset by the broad perspective acquired by the courts of appeals over time and their ability to harmonize and reconcile results in different courtrooms throughout the circuit or nation. Exercising de novo review, the courts of appeals may resolve such issues "with a view to identifying recurrent patterns, and advancing uniform outcomes. If [courts] cannot supply a 'definite rule,' they nonetheless can reduce the area of uncertainty." *Thompson* v. *Keohane*, slip op. 13-14 n.13.

II. THE DISTRICT COURT'S GROUNDS FOR DEPARTURE WERE LEGALLY INVALID

Each of the factors that the district court invoked to justify its departure below the Guidelines range rested on considerations that either were adequately taken into

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plenary review and invalidating factor as inconsistent with statutory purposes, even though the factor was not considered by the Commission). To the extent that *Rivera* does suggest that departures need not be tested against the statute, we respectfully disagree. As the decisions of the courts of appeals indicate, see pp. 27-30, *supra*, not every "unusual" factor left out of the Guidelines satisfies the Sentencing Reform Act's requirements. And the Guidelines themselves indicate that a circumstance that is normally irrelevant to departure may become relevant if it "is present to an unusual degree and distinguishes the case from the 'heartland' of cases covered by the guidelines *in a way that is important to the statutory purposes of sentencing*." Guidelines § 5K2.0 (Grounds for Departure) (policy statement).

account by the Sentencing Commission or constitute impermissible grounds for departure in light of the statutory purposes of sentencing. The court of appeals was not required to defer to the district court's determination that those factors were legally valid bases for departure.[11]

A. The District Court Erred Iin Granting A Three-Level Downward Departure Based On Its Combination Of Factors

The district court granted a three level downward departure based on a combination of: (1) additional "punishment" and potential abuse in prison; (2) the absence of a need for public protection; (3) the perceived unfairness of successive state and federal prosecutions. Pet. App. 120a, 121a, 124a-131a. None of these departure factors is legally valid, either alone or in combination.

1. a. The district court found that, as a result of their convictions, petitioners would lose their jobs, be disqualified from prospective employment in law enforcement, and suffer anguish and disgrace from those deprivations. Pet. App. 126a-128a. That series of consequences is not a permissible ground for a departure. Public officials who abuse their public trust and violate the constitutional rights of citizens in violation of 18 U.S.C. 242 will often lose their jobs and suffer lasting

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[11] Even if petitioner Koon were correct in contending (Br. 18) that the Court should adopt a "deferential, abuse-of-discretion standard" for departure decisions, it would not assist him. Courts of appeals must always review de novo the question whether the district court exercised its discretion on the basis of an erroneous view of the law. *Cooter & Gell*, 496 U.S. at 402, 405. And when a district court departs on the basis of a legally impermissible departure ground, it has necessarily abused its discretion. See *Schlup* v. *Delo*, 115 S. Ct. 851, 870 (1995) (O'Connor, J., concurring).

damage to their careers and their reputations. For police officers convicted of a felony, such consequences are virtually automatic. Those consequences therefore do not take a case out of the "heartland" of Guidelines § 2H1.4, which applies to violations of 18 U.S.C. 242.

More generally, persons convicted of crimes suffer a wide range of consequences in addition to the sentence. Defendants may lose employment, face divorce, become impoverished, lose their homes, suffer public humiliation, lose the respect of their children, and endure innumerable other adversities. Any attempt to separate which of such collateral consequences should serve as a ground for a departure from those that should not "would create a system of sentencing that would be boundless in the moral, social, and psychological examinations it required courts to make." Pet. App. 63a. Unanchored to any objective standard, the end result would ineluctably be unwarranted disparities in sentencing in violation of 18 U.S.C. 3553(a)(6).

In particular, if lawyers, police officers, and others in positions of trust were eligible for shorter sentences than less prominent defendants because they suffer more from a conviction, it would lead, "consciously or unconsciously" (Pet. App. 63a), to sentencing based on socio-economic status, a factor that is never permissible to consider. See 28 U.S.C. 994(d); Guidelines § 5H1.10. Such a downward departure would also have the effect of reversing the Commission's determination that those who abuse the public trust should receive stiffer sentences than others. Guidelines § 3B1.3 commentary (background); Ch.2, Pt.H, Introductory commentary; § 2H1.4, commentary (background). The court of appeals therefore correctly rejected job loss and its attendant consequences as a valid ground for a departure.

b. The district court's finding (Pet. App. 125a) that petitioners would suffer additional punishment because they are particularly likely to be targets of abuse in prison is likewise an invalid factor in considering a departure. Congress directed the Commission to take into account the "nature" of penal facilities in formulating the Sentencing Guidelines. 28 U.S.C. 994(g). In response, the Commission's policy statements indicate that a defendant's age or physical impairment might justify a departure in extreme cases. See Guidelines §§ 5H1.1; 5H1.4. In contrast, the Guidelines do not provide for a departure on the ground that a defendant may be particularly vulnerable to abuse in prison. It is therefore reasonable to infer that the Commission rejected unusual susceptibility to abuse in prison as a ground for departure. See *United States* v. *Lara*, 905 F.2d 599, 607 (2d Cir. 1990) (Metzner, J., dissenting).

The degree of vulnerability to assault is an entirely "subjective" judgment, and the number of defendants who may qualify for that departure is "virtually unlimited." Defendants in general face varying risks of harassment in prison (*e.g.*, a person with a reputation as an informant, a person convicted of a particularly reviled crime). Permitting downward departures based upon claims of unusual susceptibility to assault would therefore subvert the Guidelines' goal of uniformity in sentencing. See *United States* v. *Gonzalez*, 945 F.2d 525, 527-529 (2d Cir. 1991) (Winter, J. dissenting); see also *United States* v. *Smith*, 27 F.2d 649, 666 (D.C. Cir. 1994) (Sentelle, J., dissenting) (rejecting unusual susceptibility to assault as a basis for downward departure, reasoning that, if such a basis were accepted, someone who is especially safe from assault, such as a boxing champion, would be eligible for an upward departure). The Bureau of Prisons has a constitutional responsibility to protect persons who are

known to be unusually vulnerable. *Farmer* v. *Brennan*, 114 S. Ct. 1970 (1994). A sentencing court cannot assume that the Bureau will shirk its responsibility.

2. In awarding its three-level departure, the district court also relied on its view that petitioners were not likely to engage in future criminal conduct and their incarceration therefore was not necessary to protect the public. Pet. App. 128a-129a. The Guidelines, however, expressly prohibit that method of taking the unlikelihood of recidivism into account. Under the Guidelines, the likelihood that a defendant will commit a crime in the future is reflected in a defendant's criminal history category. See Guidelines Ch. 4, Pt. A, Introductory commentary. Although the Commission has authorized a court to depart downward when the defendant's criminal history category overstates that defendant's potential for recidivism, it has prohibited a departure below the bottom of the range set for criminal history category I: "The lower limit of the range for Criminal History Category I is set for a first time offender with the lowest risk of recidivism. Therefore, a departure below the lower limit of the guideline range for Criminal History Category I on the basis of the adequacy of criminal history cannot be appropriate." Guidelines § 4A1.3 (policy statement); see *United States* v. *Farah*, 991 F.2d 1065, 1070 (2d Cir. 1993); *United States* v. *Mogel*, 956 F.2d at 1563.

3. The district court also erred in positing, and then relying on, the "specter of unfairness" in successive state and federal prosecutions for the same conduct. Pet. App. 130a-131a. This Court has repeatedly held that "the Constitution does not prohibit successive prosecutions by different sovereigns based on the same conduct." *Department of Revenue* v. *Kurth Ranch*, 114 S. Ct. 1937, 1948 n.22 (1994); see *Heath* v. *Alabama*, 474 U.S. 82

(1985); *Abbate* v. *United States*, 359 U.S. 187, 194 (1959). That holding is grounded in the principle that "[w]hen a defendant in a single act violates the peace and dignity of two sovereigns by breaking the laws of each, he has committed two distinct offenses." *Heath*, 474 U.S. at 88. It also reflects the concern that "if the States are free to prosecute criminal acts violating their laws, and the resultant state prosecutions bar federal prosecutions based on the same acts, federal law enforcement must necessarily be hindered." *Ibid.* There is, therefore, no legally cognizable unfairness in successive state and federal prosecutions, and a district court's contrary view does not make it a "mitigating" factor within the meaning of 18 U.S.C. 3553(b).[12]

That is particularly true because under the so-called *Petite* policy, see *Petite* v. *United States*, 361 U.S. 529 (1960) (per curiam), the Attorney General will generally decline to authorize a second prosecution unless it is justified by "compelling Federal interests." See *United States* v. *Snell*, 592 F.2d 1083, 1087 (9th Cir.), cert. denied, 442 U.S. 944 (1979); U.S. Attorney's Manual 9-2.142. As the court of appeals explained, in this case the Attorney General's authorization of a second prosecution "necessarily reflected the conclusion that the distinct federal interests in protecting the constitutional rights of citizens to be free from unreasonable force at the hands of government had not been adequately

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[12] As the D.C. Circuit has explained: "The Commission wrote guidelines for an existing system of criminal procedure; it almost certainly did not intend that decisions traditionally within the prosecutor's ken, and within constitutional bounds, be counterbalanced by a sentencing court." *United States* v. *Dockery*, 965 F.2d 1112, 1117 (D.C. Cir. 1992); *Clark*, 8 F.3d at 842 ("[a] routine exercise of prosecutorial discretion cannot rise to the level of a 'mitigating circumstance' ").

vindicated in the state court proceeding." Pet. App. 69a. The district court's disagreement with the Attorney General's conclusion cannot form the basis for a downward departure.

Finally, reliance on a specter of unfairness in dual prosecutions is impermissible "because it speaks neither to the culpability of the defendant, the severity of the offense, nor to some other legitimate sentencing concern." Pet. App. 69a. To the contrary, application of that factor conflicts with the court's duty to impose a sentence that "reflect[s] the seriousness of the offense," 18 U.S.C. 3553(a)(2)(A), because it would depreciate the seriousness of petitioners' crimes to view the federal government's decision to intervene as "unfair." [13]

4. Because none of the three grounds for departure was a permissible one, a departure based on a combination of those three grounds was also impermissible. In an extraordinary case, a unique combination of factors may warrant a departure, even though no one factor alone would. See Guidelines § 5K2.0 (Grounds for Departure) (policy statement), commentary (not foreclosing such a possibility, but stating that such situations would be "extremely rare"); Pet. App. 59a n.31. But a court may not combine three impermissible departure grounds to form one permissible one. In this context, three times

[13] Petitioner Koon gains no assistance (Br. 47) from *Witte* v. *United States*, 115 S. Ct. 2199 (1995). In *Witte*, the Court indicated that a district court would have authority to consider a downward departure from the applicable sentencing range if the conduct underlying the offense of conviction had previously been taken into account in sentencing the defendant for a prior offense. *Id.* at 2209. Petitioners, however, have not been convicted twice, or sentenced twice based on the same conduct, and the *state* court acquittal hardly diminishes Koon's "culpability and the severity of the offense" (Br. 46) of which he was convicted in *federal* court.

zero equals zero. Any other view would create a gaping loophole in the Guidelines. Every defendant is unique, and each crime carries with it a constellation of events that single it out from all other crimes. If a district court could permissibly cumulate these factors to explain why a particular criminal defendant deserved a sentence outside the Guidelines, the Guidelines system would rapidly unravel. See *United States* v. *Minicone*, 26 F.3d 297, 301-302 (2d Cir. 1994) (collecting cases), cert. denied, 115 S. Ct. 344 (1994).

B. The District Court Erred In Granting A Downward Departure For Victim Misconduct

Section 5K2.10 (policy statement) of the Guidelines authorizes a district court to reduce a sentence below the guidelines range "[i]f the victim's wrongful conduct contributed significantly to provoking the offense behavior[.]" For two reasons, this Section does not authorize a downward departure here.

1. First, the district court found that King's unlawful conduct provoked only the initial use of force, not the offense behavior. It found that "by the time [petitioners'] conduct crossed the line to unlawfulness, Mr. King was no longer resisting arrest. He posed no objective threat, and the defendants had no reasonable perception of danger." Pet. App. 123a. The district court nonetheless concluded that Guidelines § 5K2.10 was applicable because, but for King's speeding, petitioners would never have been present at the scene, and but for King's initial wrongful conduct in resisting arrest and attempting to escape, no force would have been necessary, and the incident would not have occurred at all. Pet. App. 122a-123a.

The question whether Guidelines § 5K2.10 permits reliance on but-for causation is one of law, and the court of appeals correctly concluded that it does not. Pet. App. 71a. For that Section to apply, it is not enough that a victim's wrongful conduct sets in motion a series of events that eventually results in unlawful behavior committed for other reasons. Rather, the wrongful conduct must actually "provoke[] the offense behavior," *i.e.*, it must be a significant motivating factor for the use of unlawful force. There was no such finding here.

2. Second, the district court erred in departing on the basis of Guidelines § 5K2.10 because "[o]rdinary" victim misconduct does not fall outside the "heartland" of the excessive force guideline, Guideline § 2H1.4. In formulating the constitutional test for evaluating excessive force claims, this Court has expressly stated that "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Graham* v. *Connor*, 490 U.S. 386, 396-397 (1989). As the court of appeals explained, "[t]he incorporation of this consideration into the basic fabric of the law in this area strongly suggests that provocation by the victim in a situation where an officer must act quickly is typical—not unusual." Pet. App. 73a. Reported cases reinforce the conclusion suggested by *Graham*—victim misconduct occurs in many excessive force cases, and is therefore within the heartland of that offense.[14]

[14] See *United States* v. *Reese*, 2 F.3d 870, 874-875 (9th Cir. 1993) (victim fled from police and officer was injured in incident), cert. denied, 114 S. Ct. 928 (1994); *id.* at 876 (victim led police on chase; police car crashed, injuring officer); *United States* v. *Boyland*, 979 F.2d 851 (6th Cir. 1992), cert. denied, 113 S. Ct. 3003 (1993) (Table) (victim led officers on car chase, then ran from officers; when caught, he resisted arrest), cert. denied, 113 S. Ct. 3003 (1993); *United States* v. *Newman*, 982 F.2d 665, 667 (1st Cir. 1992) (victim threw a toilet through cell bars, resisted placement in new cell, and would not stop screaming and yelling), cert. denied, 114 S. Ct. 59 (1993); *United States* v. *Myers*, 972 F.2d 1566, 1569 (11th Cir. 1992) (victim drove under the influence, resisted arrest, injured two officers, and destroyed jail property), *id.* at 1570 (victim yelled obscenities and challenged officers to fight); cert. denied, 113 S. Ct. 1813 (1993); *United States* v. *Messerlain*, 832 F.2d 778, 781-782 (3d Cir. 1987) (victim drove while intoxicated and parked car on highway; after he was arrested, he kicked out window of police car), cert. denied, 485 U.S. 988 (1988); *United States* v. *Bigham*, 812 F.2d 943, 944-945 (5th Cir. 1987) (victims escaped from prison); *United States* v. *Patterson*, 809 F.2d 244, 245 (5th Cir. 1987) (victim refused to obey command to go through intersection, then went through slowly while officer hung onto truck); *United States* v. *Walker*, 785 F.2d 1237, 1238 (5th Cir. 1986) (victim stopped for speeding; after heated exchange, victim struck officer); *United States* v. *DeCoito*, 764 F.2d 690, 692 (9th Cir. 1985) (victim knocked down officer with car and fled; when caught, he resisted arrest); *United States* v. *Fricke*, 684 F.2d 1126, 1127-1128 (5th Cir. 1982) (victim struck officer), cert. denied, 460 U.S. 1011 (1983); *United States* v. *Harrison*, 671 F.2d 1159, 1161 (8th Cir.) (victim leaped at officer), cert. denied, 459 U.S. 847 (1982); *United States* v. *Santos*, 588 F.2d 1300, 1301 (9th Cir.) (victims refused to return to jail cells and engaged in demonstration), cert. denied, 441 U.S. 906 (1979); *United States* v. *Stokes*, 506 F.2d 771, 773 (5th Cir. 1975) (victim threatened officers).

The willfulness requirement in a Section 242 prosecution further undermines any basis for departing downward on the basis of ordinary victim misconduct. To satisfy that element of the offense, the government was required to show that petitioners "*willfully* came down on the wrong side of the *Graham* standard." Pet. App. 73a. However reasonable the initial use of force on King might have been, it did not mitigate petitioners' subsequent willfully unlawful decision to beat him as he lay prone on the ground.

Petitioner Powell (Br. 37-39) contends that the relevant offense guideline is aggravated assault (§ 2A2.2) rather than the Section 242 guideline (§ 2H1.4), and that victim misconduct is outside the heartland of the range of cases included in the aggravated assault Guideline. But petitioners were convicted of willfully depriving or permitting others to deprive King of his constitutional rights, not of aggravated assault. Pet. App. 4a. Thus, the calculation of their sentences began with Guidelines § 2H1.4, which prescribes a base offense level of the higher of ten, or six plus the offense level applicable to the underlying offense. The Commission has explained that the addition of two levels "reflects the fact that the harm involved both the underlying conduct and activity intended to deprive a person of his civil rights," and that four more levels are added where the defendant is a public official "to reflect the likely damage to public confidence in the integrity and fairness of government, and the added likely force of the threat because of the official's involvement." U.S.S.G. Ch.2, Pt.H, Introductory commentary; see § 2H1.4, comment. (background). By so structuring the Guidelines, the Commission made it clear that a civil rights violation is both a different and a more serious offense than the underlying conduct by itself. The heartland, then, must be defined in terms of the civil rights offense, not the underlying offense of aggravated assault.

The district court concluded that a downward departure was necessary to distinguish cases in which an official's use of force is unlawful from the beginning from those in which an official's initial use of force is lawful, but a later use of force is not. The fact that there are more serious ways to violate Guidelines § 2H1.4, however, is insufficient to justify a departure in a "heartland" case. *United States* v. *LeBlanc*, 24 F.3d 340, 347

(1st Cir.), cert. denied 115 S. Ct. 250 (1994). When a heartland includes a range of conduct, some of which is more serious, the place within the range can reflect the gravity of the particular offense. That is generally the end of the analysis.

Of course, upward departure may be appropriate for those officers whose conduct is particularly heinous. See Guidelines § 5K2.8 (policy statement) (upward departure for extreme conduct). And, as the court of appeals recognized (Pet. App. 76a n.38), although ordinary victim misconduct does not warrant a departure in an excessive force case, unusual victim misconduct would be a candidate for departure. In this case, however, the district court's findings show that King engaged in ordinary, rather than unusual, misconduct. Pet. App. 70a. Notably, King did not attack or harm any officer. A downward departure for victim misconduct was unwarranted.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. Sections 3553(a) and (b), 18 U.S.C., provide:

§ 3553. Imposition of a sentence

(a) Factors to be considered in imposing a sentence.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, and that are in effect on the date the defendant is sentenced; or
(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code;

(5) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2) that is in effect on the date the defendant is sentenced;

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

(b) Application of guidelines in imposing a sentence.—The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the

guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

2. Sections 3742(a)-(f), 18 U.S.C., provide:

§ 3742. Review of a sentence

(a) Appeal by a defendant.—A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines; or

(3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline

range, or includes a more limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the maximum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

(b) Appeal by the Government.—The Government may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is less than the sentence specified in the applicable guideline range to the extent that the sentence includes a lesser fine or term of imprisonment, probation, or supervised release than the minimum established in the guideline range, or includes a less limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the minimum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

The Government may not further prosecute such appeal without the personal approval of the Attorney General, the Solicitor General, or a deputy solicitor general designated by the Solicitor General.

(c) Plea agreements.—In the case of a plea agreement that includes a specific sentence under rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure—

(1) a defendant may not file a notice of appeal under paragraph (3) or (4) of subsection (a) unless the sentence imposed is greater than the sentence set forth in such agreement; and

(2) the Government may not file a notice of appeal under paragraph (3) or (4) of subsection (b) unless the sentence imposed is less than the sentence set forth in such agreement.

(d) Record on review.—If a notice of appeal is filed in the district court pursuant to subsection (a) or (b), the clerk shall certify to the court of appeals—

(1) that portion of the record in the case that is designated as pertinent by either of the parties;

(2) the presentence report; and

(3) the information submitted during the sentencing proceeding.

(e) Consideration.—Upon review of the record, the court of appeals shall determine whether the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is outside the applicable guideline range, and is unreasonable, having regard for—

(A) the factors to be considered in imposing a sentence, as set forth in chapter 227 of this title; and

(B) the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c); or

(4) was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable.

The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and shall give due deference to the district court's application of the guidelines to the facts.

(f) Decision and disposition.—If the court of appeals determines that the sentence—

(1) was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(2) is outside the applicable guideline range and is unreasonable or was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable, it shall state specific reasons for its conclusions and—

(A) if it determines that the sentence is too high and the appeal has been filed under subsection (a), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(B) if it determines that the sentence is too low and the appeal has been filed under subsection (b), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(3) is not described in paragraph (1) or (2), it shall affirm the sentence.

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No. 94-1664

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

STACEY C. KOON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Steven E. Zipperstein, *Certain Uncertainty: Appellate Review an the Sentencing Guidelines*, 66 S. Cal. L. Rev. 607, (1992). 5

INTRODUCTION

The United States advocates a standard for reviewing district court decisions to depart from the Sentencing Guidelines that would eliminate the only realm of traditional sentencing discretion preserved for sentencing judges under the Sentencing Reform Act (the "Act"). The Court should reject the de novo standard proposed by the United States and hold that departure decisions are subject to deferential, abuse-of-discretion review.

Although both Congress and the Sentencing Commission quite clearly intended to afford district courts discretion to depart from the Guidelines' sentencing range in "unusual" cases, *see, e.g.*, U.S.S.G. Ch. I, Pt. A, intro. comment. (4)(b), the United States contends that the courts of appeals have broad, plenary authority to overturn departure decisions even where, as here, the district court relies on a factor (victim provocation) that the Sentencing Commission has itself identified as a proper ground for departure. The United States' position is plainly contrary to the language and legislative history of the Act and cannot be squared with the express policy statements of the Sentencing Commission that, except for certain explicitly prohibited factors, the Commission did "not intend to limit the kinds of factors . . . that could constitute grounds for departure in an unusual case." *Id.*

The United States' argument that the statutory language supports its de novo review standard is at least audacious. In essence, it contends that because the Act expressly requires deferential review of the "district court's application of the guidelines to the facts," it must have intended de novo review of decisions to depart from the Guidelines. U.S. Br. at 22-23. However, any reasonable interpretation of the Act reveals congressional intention that

district court decisions, including departure decisions, involving application of the Guidelines in particular factual settings require deferential review. Any other interpretation of the Act, particularly in light of its other provisions, would be highly anomalous. Absent a clear congressional expression to the contrary, departure decisions are quintessentially discretionary judgments involving application of the Guidelines to the peculiar facts of a particular case.

The United States' interpretation of the legislative history is equally incongruous and clearly incorrect. The United States relies upon the Senate Report in advocating de novo review of district court departure decisions, but that Report states in no uncertain terms that Congress intended to preserve for the district courts a reservoir of discretion to ensure the "thoughtful imposition of individualized sentences" and to impose an "obligation" on the sentencing judge to consider departure "outside the guidelines." S. Rep. No. 225, 98th Cong., 1st Sess. 52 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3235. The United States' reliance upon the 1988 amendment to the appellate review provision of the Act, U.S. Br. at 26-27, is misplaced because that amendment *added* the requirement that appeals courts give "due deference" to a district court's application of the Guidelines to the facts. The amendment thus reflected congressional sentiment explicitly favoring deferential, not de novo, review of decisions regarding when, how and to what extent to apply the Guidelines.

The United States' contention that "institutional advantages" support de novo review is refuted by 200 years of tradition in this country. It is also squarely inconsistent with the intricate sentencing scheme established by the Act because it would substitute federal appeals courts for the Commission as the predominant expositors of federal

sentencing policy concerning departures. This Court has long recognized that the sentencing judge is in a far better position and is more institutionally suited than an appeals court to evaluate the unique circumstances of a particular case to determine the proper punishment. Neither the Act nor the Guidelines alter that reality. And "except to the extent specifically directed by statute, 'it is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence.'" *Williams* v. *United States*, 503 U.S. 193, 205 (1992) (quoting *Solem* v. *Helm*, 463 U.S. 277, 290 n.160 (1983)).

Finally, the United States asserts that the "statutory purposes" of the Act support de novo review because Congress intended to "cabin" sentencing discretion and thereby eliminate sentencing disparities. But Congress' other explicit statutory purpose was to "maintai[n] sufficient flexibility to permit individualized sentences," 28 U.S.C. § 991(b)(1)(B), and it therefore expressly approved discretionary departures in unusual and atypical cases. Abuse-of-discretion review of such departures is fully consistent with, and required by, this latter goal of the statute.

In short, all of the factors identified by the United States as relevant to the proper standard of review militate in favor of abuse-of-discretion review of district court departure decisions. The district court here acted well within its discretion in departing downward, and its sentencing decision should be reinstated by this Court.

ARGUMENT

A. Abuse Of Discretion Is The Proper Standard Of Review

As demonstrated below, the considerations identified by the United States as relevant to the determination of the proper standard of review — the statutory text, legislative history, institutional advantages and statutory purposes — all point in the direction of abuse-of-discretion, not de novo, review.

1. Statutory Text. Despite the absence of *any* reference in the Act to de novo appellate review of Sentencing Guideline departures, the United States boldly declares that "[t]he text of the appellate review provisions strongly supports de novo review." U.S. Br. at 22. That position is simply not supported by any fair reading of the statutory text.

a. The Act's appellate review provisions say nothing about de novo review. Rather, the Act's *only* provisions concerning the applicable standard of review expressly require deference to district court sentencing decisions. The Act requires that courts of appeals "shall accept" district court factual findings "unless they are clearly erroneous" and "shall give due deference to the district court's application of the guidelines to the facts." 18 U.S.C. § 3742(e). The United States contends that Congress' "express provision for a measure of deference on those two appellate issues strongly implies" (U.S. Br. at 22) that Congress intended to require de novo review of "the threshold legal question" as to whether a ground for a departure is a permissible one. But "application of the guidelines to the facts" inescapably includes consideration of whether and when to depart from the Guidelines. It would have been most anomalous for Congress to have

required deferential review of "application of the guidelines to the facts," but de novo review of the statutorily required "find[ing]" that there exists a circumstance "that should result" in a departure from the Guidelines. 18 U.S.C. § 3553(b).[1]

b. The United States' contention that a district court's decision that particular factors warrant a departure from the Guidelines is an exclusively legal question, U.S. Br. at 22-23, is incorrect. Sentencing departures inevitably involve fact-predominant mixed questions of law and fact, *i.e.*, "application of the guidelines to the facts." 18 U.S.C. § 3742(e). For example, the 5-level departure for victim misconduct in this case resulted from the district court's application of Guideline § 5K2.10, p.s. to the unique facts of Mr. King's unlawful conduct and resistance to arrest. Moreover, this departure as well as the 3-level departure based upon a combination of other factors involved an

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[1] If anything, Congress' failure to mandate de novo review supports the inference that Congress intended deferential not de novo review of departure decisions, especially in light of the fact that prior to enactment of the Act, district court sentencing decisions were virtually unreviewable on appeal. *See Williams*, 503 U.S. at 205 (unless specifically directed to do otherwise by statute, courts of appeals must give traditional deference to district courts concerning sentencing decisions); Steven E. Zipperstein, *Certain Uncertainty: Appellate Review and the Sentencing Guidelines*, 66 S. Cal. L. Rev. 607, 636 (1992) ("Congress could easily have used the phrase 'de novo' or 'plenary' if it had wanted to confer such broad power. Certainly its use of the phrase 'clearly erroneous' shows that Congress knew how to use the precise wording for a standard of review. Indeed, the phrase 'due deference' seems incompatible with the nature and scope of de novo review.").

inquiry as to whether the extraordinary circumstances (facts) of this case made it so unusual as to fall outside the "heartland" of cases to which the Guideline for excessive force, § 2H1.4, applies. These departures are precisely the type of "application[s] of the guidelines to the facts" of a specific case that must be accorded "due deference" under the Act.

c. The United States argues that de novo review is appropriate in light of the Act's provision that courts only consider "the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission" in "determining whether a circumstance was adequately taken into consideration" by the Commission in formulating the relevant Guidelines. *See* U.S. Br. at 23. That statutory directive, however, in no way mandates the sweeping plenary role for appellate courts that the United States advocates. If anything, it suggests the reverse.

Except for a few specifically prohibited factors, *see* Pet. Br. at 26 n.11, the Commission did "not intend to limit the kinds of factors, whether or not mentioned anywhere in the guidelines, that could constitute grounds for departure in an unusual case," U.S.S.G. Ch. I, Pt. A, intro. comment. (4)(b), and "the Guidelines place essentially no limit on the number of potential factors that may warrant a departure," *Burns* v. *United States*, 501 U.S. 129, 136-37 (1991); *see also* 18 U.S.C. § 3661 ("No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."). To be sure, by restricting courts to certain written Sentencing Commission materials in determining whether a factor has been "adequately taken into consideration," the Act requires courts to interpret the Guidelines, but it also thereby

sharply limits the sources on which a court may base a finding that it may not depart from the Guidelines. If the text of these materials does not reveal that a particular factor has been adequately considered by the Commission, then the district court has "legal freedom," if not the duty, to consider that factor in determining whether the facts of a case make it so unusual as to warrant a departure. U.S.S.G. Ch. 1, Pt. A, intro. comment. (4)(b); *see United States* v. *Rivera*, 994 F.2d 942, 949 (1st Cir. 1993). Moreover, even where that textual analysis reveals that "the reason for departure is taken into account in the guidelines," a district court still has discretion to depart "if the court determines that, in light of unusual circumstances, the guideline level attached to that factor is inadequate." U.S.S.G. § 5K2.0, p.s.[2] Thus, this inquiry will necessarily require the district court to "appl[y] . . . the

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[2] According to the United States, de novo appellate review is appropriate in light of the Act's requirement that the district court find that an "aggravating" or "mitigating" circumstance "should result" in a departure. *See* U.S. Br. at 24-25. However, prior to the Act, district courts regularly made discretionary judgments as to whether aggravating or mitigating factors justified a longer or shorter sentence than what would otherwise be imposed. *See, e.g., United States* v. *Neyens*, 831 F.2d 156, 160 (7th Cir. 1987) (no abuse of discretion where "district judge was aware of the mitigating circumstances and in fact considered them"); *United States* v. *Catch The Bear*, 727 F.2d 759, 761 (8th Cir. 1984) (sentence reviewed only for abuse of discretion, and "[t]he sentencing court may consider aggravating as well as mitigating factors in setting a sentence"). The codification of this practice hardly signals a congressional intention to establish a new and rigorous plenary standard of appellate review for departure determinations.

guidelines to the facts" to decide whether a factor warrants departure.

d. The United States contends that courts must go beyond the Guidelines and Sentencing Commission positions and consider general notions concerning "the purposes of sentencing" described in 18 U.S.C. § 3553(a) to decide whether a particular factor is a proper basis for departure. *See* U.S. Br. at 24-26, 37. That process, it contends, goes beyond the evidence and is a purely legal determination. But the Act's broadly worded directives inevitably are dependent on application of such principles to the particular circumstances of the case. These decisions do not readily lend themselves to the articulation of uniform legal standards for sentencing departures. Case-specific inquiries such as "the need for the sentence imposed to protect the public from further crimes of the defendant," 18 U.S.C. § 3553(a)(2)(C), "to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner," *id.* § 3553(a)(2)(D), or "to provide just punishment for the offense," *id.* § 3553(a)(2)(A), are not the types of issues that call for or benefit from de novo appellate review.

e. The United States also relies on the statutory command that the district "'court *shall* impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in [18 U.S.C. § 3553(a)(2)]'." U.S. Br. at 24 (quoting 18 U.S.C. § 3553(a)) (emphasis in Brief for the United States) That statutory provision, however, only underscores that it is the *district court*, not the court of appeals, that has the obligation to impose a sentence consistent with § 3553(a)(2). Indeed, the Act explicitly authorizes a departure if the district "court *finds* that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by

the Sentencing Commission in formulating the guidelines." 18 U.S.C. § 3553(b) (emphasis added). These provisions thus "emphasize[ ] the fact that the determination is for the district court to make, and . . . suggest[] some deference to the district court on appeal." *Pierce* v. *Underwood*, 487 U.S. 552, 559 (1988) (appellate deference suggested by statutory provision stating that attorney's fees are to be awarded "unless the [district] court finds that the position of the United States was substantially justified").

f. Finally, even if in some cases a district court's findings concerning a departure technically may involve a "legal issue," it does not necessarily follow that Congress intended for de novo appellate review. "From the given that the issue is not one of fact, one can confidently conclude that Congress would not have expected, on the basis of the case law, that a clearly-erroneous standard of review would be applied, but not that it would have expected review de novo rather than review for abuse-of-discretion." *Pierce*, 487 U.S. at 558 n.1. Indeed, this Court has recognized that abuse-of-discretion appellate review may be appropriate even though the type of district court ruling at issue may turn on resolution of a pure question of law. *See id.* at 560 (adopting abuse-of-discretion standard for reviewing attorney's fee awards under the Equal Access to Justice Act, while acknowledging that "[i]n some cases, such as the present one, the attorney's fee determinations will involve a judgment ultimately based upon evaluation of the purely legal issue governing the litigation"); *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 405 (1990) ("[A]n appellate court should apply an abuse-of-discretion standard in reviewing *all* aspects of a district court's Rule 11 determination.") (emphasis added).

2. Legislative History. The United States maintains that the discussion of appellate review in the Senate Report supports its argument for de novo review. *See* U.S. Br. at 26-27. That Report, however, emphasized that the Sentencing Guidelines were *not* intended to "remove all of the [district] judge's sentencing discretion." S. Rep. No. 225, *supra*, at 51, *reprinted in* 1984 U.S.C.C.A.N. at 3234. The Report states that "the sentencing judge has an *obligation* to consider *all* relevant factors in a case and *impose a sentence outside the guidelines* in an appropriate case." S. Rep. No. 225, *supra*, at 52 (emphasis added), *reprinted in* 1984 U.S.S.C.A.N. at 3235.

The United States' citation of the legislative history of the 1988 amendment to the appellate review section of the Act is perplexing inasmuch as the amendment itself says nothing about de novo review and, in fact, mandates that appellate courts give "due deference" to a district court's "application of the guidelines to the facts." If Congress had intended for de novo review to apply, it would surely have said so in the Act. The language it did use mandates deferential, not de novo, review.

3. Institutional Advantages. The United States argues that de novo review has the institutional advantage of permitting the development of case law and the "distillation of general legal principles." U.S. Br. at 27. In fact, de novo review will inhibit the Sentencing Commission from making those judgments. The abuse-of-discretion standard permits the case law development of general legal principles, but has the advantage of giving the district courts sufficient flexibility to make departure determinations in widely varying factual contexts not suited, at least initially, for bright-line rules. Over time, the district courts' collective experience in making departure determinations under the Guidelines will allow

for general legal principles to emerge and for the Sentencing Commission to consider appropriate adjustments. *See Rivera*, 994 F.2d at 951. *See generally Pierce*, 487 U.S. at 561 (under the deferential review standard of Federal Rule of Procedure 39(b), "'[t]ime and experience have allowed the formless problem to take shape, and the contours of a guiding principle to emerge'") (quoting Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 Syracuse L. Rev. 635, 663 (1971)).

De novo review would unnecessarily cut short the process by which new factors are considered by the district courts in a variety of factual contexts and then ultimately reviewed by the Commission in determining whether to revise the Guidelines. The practical effects of appellate courts' plenary review of sentencing departures would be to deprive the Commission of the information it needs to fulfill its statutory mission, thus displacing the Commission's statutory responsibility to formulate federal sentencing policy, and placing appellate courts in the awkward, time-consuming and highly inefficient position of micromanaging sentencing determinations. And, of course, with the availability of de novo appellate review in every case where the district court departs from the Guidelines, the party that lost below will have a strong incentive to appeal the sentence, further burdening the dockets of the courts of appeals.

Finally, historical practice confirms the institutional advantages of abuse-of-discretion review. This Court has long recognized that the district court, not the court of appeals, is best situated to make sentencing determinations, and the development of the Sentencing Guidelines "has not changed [this Court's] view" in this regard. *See Williams*, 503 U.S. at 203. The aggressive role proposed by the

United States for appellate courts, which is not "specifically directed by statute," *id.*, constitutes a radical break from this tradition that should be rejected.[3]

4. Statutory purposes. Petitioner agrees with the United States that one of the goals of Congress in enacting the Act was "eliminating unwarranted disparity in sentencing." U.S. Br. at 30. But Congress also explicitly directed that the Guidelines should "maintai[n] *sufficient flexibility to permit individualized sentences* when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices." 28 U.S.C. § 991(b)(1)(B) (emphasis added). Congress did not want the district courts to apply the Guidelines "in a mechanistic fashion," but rather vested them with responsibility to consider all relevant factors and to depart from the Guidelines where necessary to ensure a fair and just punishment under the circumstances. *See* S. Rep. No. 225, *supra*, at 52, *reprinted in* 1984 U.S.C.C.A.N. at 3235.

The abuse-of-discretion standard effectuates the congressional goals of flexibility and individualized sentences by respecting the discretion of district courts to fashion sentences to reflect the unique circumstances of an unusual case, while at the same time providing a basis for striking down departures that are so clearly unwarranted

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[3] The United States argues that the institutional advantages of the de novo standard are demonstrated by cases in which appellate courts held that various factors could not be a valid basis for a departure. *See* U.S. Br. at 28-30. In most of the cited cases, however, the district court had refused to depart on the ground at issue; thus, there was no obvious benefit from plenary appellate review.

that they can be characterized as an abuse of the departure authority. The de novo standard, by contrast, undermines the Act's goals by intruding on an area of district court discretion that Congress sought to preserve and by requiring appellate courts to second-guess district court determinations based on the particular facts of every case presented to them.

B. The District Court Acted Well Within Its Discretion In Departing From The Guidelines In This Case

The United States is unable to point to any particular statute or Guidelines provision explicitly precluding the consideration of any of the factors relied upon by the district court to depart in this case. The district court's departure decisions are therefore only subject to review for abuse of discretion. Under that standard, the departures must be sustained because the district court reasonably concluded that a departure was warranted based upon the extraordinary circumstances of this case. Indeed, the United States does not deny that if the district court was legally authorized to consider the factors upon which it relied, the court acted within its discretion in determining to depart in this case. *See* U.S. Br. at 36-37 & n.11.

1. The 5-Level Departure. The United States offers two reasons why it believes that the district court's five-level departure for victim misconduct was improper. Neither provides justification for reversing the district court's departure on this ground.

First, the United States mischaracterizes the factual findings of the district court regarding the link between Mr. King's misbehavior and petitioner's conduct, and then argues that these findings do not, as a matter of law, warrant a departure under Guidelines § 5K2.10, p.s. According to the United States, "the district court found that King's unlawful conduct provoked only the initial use

of force, not the offense behavior." U.S. Br. at 43. The district court, however, did not simply make a finding of provocation of the initial use of force. It also quite explicitly found "that Mr. King's wrongful conduct contributed significantly to provoking the offense behavior," Pet. App. 121a — the precise grounds on which departure is permitted under § 5K2.10. *See* U.S.S.G. § 5K2.10, p.s. ("If the victim's wrongful conduct contributed significantly to provoking the offense behavior, the court may reduce the sentence below the guideline range to reflect the nature and circumstances of the offense.").[4] Moreover, as the United States does not dispute, the district court based its departure determination on each of the relevant factors under § 5K2.10, p.s. *See* Pet. Br. at 42 n.15. Thus, the United States is flatly wrong when it asserts that the district court did not make all the necessary findings for a departure under § 5K2.10, p.s. *See* U.S. Br. at 44.

The United States' second argument for reversing the victim misconduct departure is that "'[o]rdinary' victim misconduct does not fall outside the 'heartland' of the excessive force guideline, Guideline § 2H1.4." U.S. Br. at 44. This argument must be rejected for several reasons. First, the United States can only make this argument by advancing the curious proposition that "King engaged in ordinary, rather than unusual, misconduct." *Id.* at 47. The

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[4] To buttress its argument, the United States attempts to rewrite § 5K2.10, p.s. to require that "the wrongful conduct must actually 'provoke[] the offense behavior.'" U.S. Br. at 44. That Guideline, however, only requires that "the victim's wrongful conduct *contributed significantly to provoking* the offense behavior." U.S.S.G. § 5K2.10, p.s. (emphasis added).

United States fails to offer any cogent explanation as to why it is somehow "ordinary" for an individual, while "admittedly intoxicated," Pet. App. 121a, to drive "in excess of 100 m.p.h.," *id.* 97a, willfully elude three police vehicles for eight miles, *id.* 98a, and then, after finally being forced to stop, to refuse to obey police orders to step out of his car, *id.* 121a-122a, to "resist[] and bec[o]me combative," throwing off four police officers and "forcing . . . [them] to retreat," *id.* 122a, and to "charge towards" a police officer, *id.* 101a, shrugging off the electrical charge of two taser darts, while "attempt[ing] to escape from police custody," *id.* 122a.

But more fundamentally, the United States is not able to point to any statutory text or Guidelines provision, policy statement or commentary supporting its assertion that victim misconduct of the type encountered by petitioner falls within the "heartland" of the excessive force guideline, § 2H1.4. The best that the United States can do is to rely on *Graham* v. *Connor*, 490 U.S. 386 (1989) (*see* U.S. Br. at 44-45), and thirteen cases decided during the past twenty years that did not involve Guidelines departure issues (*see id.* at 44 n.14), to assert that "victim misconduct occurs in many excessive force cases, and is therefore within the heartland of that offense." *Id.* at 44. There is, of course, no basis in the Guidelines for concluding that Congress or the Commission viewed any of these cases as precluding victim misconduct as a basis for departure in excessive force cases.

At bottom, the United States' position rests not on any proper interpretation of a statute or Guidelines provision, but rather simply a policy argument that victim misconduct *should not* be a consideration in determining whether to depart from the Guidelines in excessive force cases. But that policy has not yet been enacted into law by Congress

or adopted as part of the Guidelines by the Commission, and federal appellate courts are not empowered to create a body of federal common law adopting and implementing any such policy.

2. The 3-Level Departure. The United States is also unable to point to any statute or Guidelines provision precluding consideration of any of the factors underlying the district court's 3-level departure. The United States' arguments are predicated on policy arguments that have no basis in any statutory or Guidelines text. The district court's 3-level departure was not an abuse of discretion.

a. In arguing that consideration of the successive prosecutions is improper, the United States relies on double jeopardy cases applying the dual sovereignty doctrine to argue that "there is . . . no legally cognizable unfairness in successive state and federal prosecutions." U.S. Br. at 41. That assertion squarely contradicts this Court's recognition that successive state and federal prosecutions, although not prohibited by the Double Jeopardy Clause, nevertheless implicate fundamental concerns of fairness. *See Rinaldi* v. *United States*, 434 U.S. 22, 28 (1977) (noting "the Court's continuing sensitivity to the fairness implications of the multiple prosecution power"); *id.* at 29 (noting that "but for the 'dual sovereignty' principle inherent in our federal system," the prohibition of successive state and federal prosecutions "would be embraced by the Double Jeopardy Clause"); *see also Bartkus* v. *Illinois*, 359 U.S. 121, 150 (1959) (Black, J., dissenting, joined by the Chief Justice and Douglas, J.) (arguing that the Double Jeopardy Clause precludes the state conviction of a defendant who had been acquitted of the same offense in the federal courts). The United States' argument also ignores the longstanding recognition under English law and the laws of many States, including California, that successive prosecution by two

sovereigns of the same conduct is improper. *See* Pet. Br. at 46.

The United States also argues that "reliance on a specter of unfairness in dual prosecutions is impermissible 'because it speaks neither to the culpability of the defendant, the severity of the offense, nor to some other legitimate sentencing concern.'" U.S. Br. at 42 (quoting Pet. App. 69a). Surely, however, the district court could reasonably conclude that the extraordinary public pressures that accompanied each prosecution, particularly the second one, after the acquittal and the riot, may be properly considered "to provide just punishment for the offense," 18 U.S.C. § 3553(a)(2), one of the explicit goals of sentencing under the Act. As the district court noted, the federal charges against petitioner involved the same central factual questions at issue in the state trial: "whether Defendants' conduct constituted a use of excessive force, and whether such use was intentional." Pet. App. 147a; *see also id.* 14a ("The ultimate issue in the [federal] case was . . . whether [the defendants] . . . willfully used unreasonable force."). In rendering a verdict of acquittal, the state jury necessarily decided these issues in favor of petitioner. He was prosecuted a second time only after an unprecedented community response and intense national pressure. Thus, contrary to what the United States asserts, *see* U.S. Br. at 42 n.13, petitioner's prior state court acquittal and the circumstance of his second prosecution were directly relevant to legitimate sentencing concerns such as fairness in punishment.

b. The United States argues that consideration of petitioner's heightened susceptibility to danger in prison is improper for two reasons. First, the United States maintains that it is "reasonable to infer that the Commission rejected unusual susceptibility to abuse in prison as a

ground for departure." U.S. Br. at 39. In support, the United States cites to 28 U.S.C. § 994(g), which "direct[s] the Commission to take into account the 'nature' of penal facilities in formulating the Sentencing Guidelines." U.S. Br. at 39. That statutory provision, however, does not pertain to sentencing departures, but rather to changes and expansion of prison facilities that may become necessary as a result of the Guidelines. *See* 28 U.S.C. § 994(g) (directing the Commission to "take into account the nature and capacity of the penal, correctional, and other facilities and services available" and to "make recommendations" concerning changes in such facilities and services that might be warranted as a result of the Guidelines). The United States also cites to Guidelines §§ 5H1.1 and 5H1.4, which allow departures based on a defendant's age or physical impairment, as evidence that the Commission did not intend for heightened susceptibility to danger in prison to be a departure consideration. However, neither of these Guidelines, nor any other Guidelines provision, expressly precludes consideration of this factor, and the logical inference is that the Commission intended to permit such consideration, given its direction that it did "*not* intend to limit the kinds of factors, *whether or not mentioned anywhere in the guidelines*, that could constitute grounds for departure in an unusual case." U.S.S.G. Ch. I, Pt. A, intro. comment. (4)(b) (emphasis added).[5] The Commission, of course, has the power to remove this factor as a consideration, but has not done so.

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[5] The district court found that petitioner's notoriety and unpopularity resulting from the widespread publicity and controversy surrounding this case, not his age or physical condition, made him a uniquely vulnerable target of violent behavior in prison. Pet. App. 125a.

The United States also contends that consideration of petitioner's safety in prison "is an entirely 'subjective' judgment" that would result in a "'virtually unlimited'" number of cases in which departure would be appropriate. U.S. Br. at 39. However, any objective review of the volatile, highly charged atmosphere and unprecedented level of actual and potential civil unrest surrounding petitioner's prosecutions would confirm that the circumstances of this case presented extraordinary concerns of prison safety for the defendant not present in other cases.[6]

c. The United States fails to cite any statutory or Guidelines provision precluding consideration of the administrative punishment of petitioner. Rather, the United States argues as a policy matter that departure on this ground would lead to a system of "boundless" sentencing considerations, leading to "unwarranted disparities in sentencing." U.S. Br. at 38. Yet, it can hardly be disputed that the extraordinary public pressure placed on the Los Angeles Police Department to punish Mr. Koon is unlikely to be replicated in many cases. Until the Commission decides otherwise, the Guidelines "retain enough flexibility" in these unique circumstances to permit downward departures based on consideration of the

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[6] Indeed, a recent attempt to kill petitioner at the halfway house where petitioner was incarcerated confirms the reasonableness of the district court's conclusion that petitioner is unusually susceptible to harm in prison. On November 23, 1995, Randall Tolbert "stormed a Riverside County halfway house . . . looking for . . . [Mr. Koon] but killed a hostage instead before sheriff's deputies shot him to death." Ralph Frammolino, *2 Die As Gunman Seeks Koon At Halfway House*, L.A. Times, Nov. 24, 1995, at A1.

additional punishment inflicted on Mr. Koon in other proceedings. *Cf. Witte* v. *United States*, 115 S. Ct. 2199, 2209 (1995).[7]

d. Whether or not the United States is correct that petitioner's unlikelihood of recidivism, standing alone, is an insufficient basis to depart from the Guidelines, U.S. Br. at 40, there is nothing in the Guidelines explicitly precluding a district court from taking this factor into account along with other factors in determining whether a departure is warranted. And, the United States cannot dispute that Congress mandated that district courts consider the likelihood of the defendant's future criminal activity in determining the appropriate sentence. *See* U.S.C. § 3553(a)(2)(C).

CONCLUSION

The court of appeals' decision will put sentencing judges in straitjackets and will transfer the Sentencing Commission's responsibilities for sentencing policy to the appellate courts and, ultimately, to this Court. Congress did not provide for or intend such a result.

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[7] The United States asserts, as did the court below, that a departure based upon consideration of petitioner's administrative punishment may be based "'consciously or unconsciously' (Pet. App. 63a), . . . on socio-economic status, a factor that is never permissible to consider." U.S. Br. at 38. That statement is wholly unwarranted. There is nothing in the record suggesting that petitioner's socio-economic status played any role in the district court's departure determination in this case, and the United States' apparent suggestion that petitioner's status as a law enforcement officer should somehow limit the district court's ability to consider administrative punishment finds no support in any statute or Guidelines provision.

December 28, 1995

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Supreme Court, U.S.
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CLERK

No. 94-1664

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

STACEY C. KOON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE LAW ENFORCEMENT LEGAL DEFENSE FUND AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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U.S. Sentencing Commission, The Federal Sentencing Guidelines: A Report on the Operation of the Guidelines System and Short-term Impacts on Disparity in Sentencing, Use of Incarceration, and Prosecutorial Discretion and Plea Bargaining 101-14 (1991) 14, 15

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

No. 94-1664

STACEY C. KOON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF THE LAW ENFORCEMENT LEGAL DEFENSE FUND AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*

The Law Enforcement Legal Defense Fund is a national non-profit public interest law and policy center organized to support law enforcement officials through financial assistance and by promoting public awareness of the role of police and respect for the law enforcement community.

SUMMARY OF ARGUMENT

This case involves the standard by which courts of appeal should review district courts' decisions to depart from the range determined by the Sentencing Guidelines when there are extraordinary circumstances. Congress intended the Sentencing Guidelines to be sufficiently flexible to allow imposition of individualized sentences. Some courts of appeal, however, have strictly reviewed trial courts' discretionary departures. This strict review is contrary to Congressional intent and to the general principles of departure as contained in the Sentencing Guidelines.

ARGUMENT

I. The Sentencing Guidelines Are Intended To Be Flexible And To Provide District Courts Sufficient Discretion To Allow Individualized Sentencing

Congress has set forth basic instructions to guide the Sentencing Commission and the courts in the Sentencing Reform Act of 1984 as amended, 18 U.S.C. § 3551 *et seq.* and 28 U.S.C. § 961 *et seq.* and § 3661. In § 3553(a), Congress describes the goal of contemporary sentencing: "a sentence sufficient, but not greater than necessary, to comply with the purposes" of sentencing. A sentence should be based on "the nature and circumstances of the offense and the history and characteristics of the defendant." 18 U.S.C. § 3553(a)(1). One of the statutorily mandated purposes of the guidelines is to:

> [Maintain] sufficient flexibility to permit individualized sentences when warranted by mitigating ... factors not taken into account in the establishment of [the guidelines].

28 U.S.C. § 991(b)(1)(B). The court is instructed to impose a sentence within the range described by the guidelines,

> unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission.

18 U.S.C. § 3553(b).

Congress also instructed the Sentencing Commission to consider whether a number of factors are relevant to a defendant's sentence and to take them into account in the sentencing guidelines only to the extent that they are relevant. 28 U.S.C. § 994(c),(d). However, in 28 U.S.C. § 994(e), Congress discouraged the Commission from relying on some of these same factors by requiring that the guidelines and policy statements "reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant." Moreover, Congress prohibited the Commission from considering other factors by requiring it to "assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed and socioeconomic status of offenders." 28 U.S.C. 994(d).

Notwithstanding the foregoing limitations, Congress has provided that "No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." 28 U.S.C. § 3661.

The Congressional intent regarding the role of the sentencing guidelines and judicial discretion was explained as follows in the legislative history:

> The Committee does not intend that the guidelines be imposed in a mechanistic fashion. It believes that the sentencing judge has an obligation to consider all the relevant factors in a case and to impose a sentence outside the guidelines in an appropriate case. The purpose of the sentencing guidelines is to provide a structure of evaluating the fairness and appropriateness of the sentence for an individual offender, not to eliminate the thoughtful imposition of individualized sentences.

S. Rep. No. 225, 98th Cong., 2d Sess. 52, *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3235.

Although the statutory scheme is complex, it is clear that Congress did not intend the Sentencing Reform Act to relegate sentencing judges to the role of mechanical calculators. Rather, the statute allows judicial consideration of all information concerning the background of a defendant and gives the court discretion to impose a sentence outside the guidelines range in situations where

relevant factors were not adequately reflected in the formulation of the guidelines.[1]

In 1987, the Sentencing Commission introduced the Guidelines, with instructions to courts to view the Guidelines "as carving out a 'heartland'" of typical cases. *See* U.S. Sentencing Commission, Federal Sentencing Guidelines Manual (1987), ch. 1, pt. A, intro. 4(b) ("U.S.S.G."). Departures based on certain factors are expressly forbidden; in other circumstances, departures are encouraged.[2]

The Sentencing Commission provided, without explanation, that sentencing judges should be discouraged from considering factors described in U.S.S.G. § 5H1.1-.11.[3] However, the Sentencing Commission's policy

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[1]The test for guidelines applicability in 18 U.S.C. § 3553(b) focuses not merely on whether the Sentencing Commission considered a factor in formulating the guidelines, but also whether the consideration was adequate. Review of the adequacy of the consideration renders "the Commission accountable with respect to the *quality* of the guideline and assures courts that they need not follow ill-considered limitations on their discretion." *See* Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 Yale L.J. 1681, 1699 (June 1992).

[2]For instance, courts may not consider race, sex, national origin, creed, religion, or socio-economic status in sentencing. U.S.S.G. § 5H1.10. U.S.S.G. § 5K lists several considerations that may take a case outside the "heartland" and warrant a departure. For instance, victim misconduct that contributes significantly to provoking the offense may reduce the sentence.

[3]U.S.S.G. § 5H1.1-.11 states that age, education, vocational skills, mental and emotional conditions, physical condition,

[Footnote continued on next page]

statement as to departures indicates that "[t]he controlling decision as to whether and to what extent departure is warranted can only be made by the courts." U.S.S.G. § 5K2.0.

Congress intended the courts to have flexibility to depart from the guidelines when appropriate. The Sentencing Commission's instructions to the courts do not provide an enumeration of all of the possible circumstances that could justify such departures. Thus, the courts have been faced with the task of developing a jurisprudence for the standards governing departure from the guidelines.

II. There Is A Conflict Among The Circuits As To The Appropriate Standard Of Appellate Review Of Downward Departures Under The Sentencing Guidelines

The courts of appeal have diverged in their response to district courts' decisions to depart. Some courts of appeal strictly review district judges' discretionary departures, while other courts of appeal recognize the trial judge's superior feel for the case.

A. The Ninth Circuit's Decision Reflects The Strict *De Novo* Review That is Also Followed in the Third, Fourth, Sixth and Tenth Circuits

In this case, the Ninth Circuit strictly reviewed whether the district court had authority to depart. Although the

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[Footnote continued from previous page]

employment record, family and community ties are "not ordinarily relevant" to sentencing decisions.

court reviewed the district court's factual findings concerning bodily injury for clear error, it reviewed *de novo* the district court's determination of whether the factors used by Judge Davies justified a departure.

With regard to the three level downward departure, the Ninth Circuit ruled that the approach of combining factors to justify a departure was allowed. Pet. App. at 59a. However, the court then reviewed each factor alone, and determined that none of the factors were allowable bases for departure.

First, the Ninth Circuit held that the additional punishment Mr. Koon faced was incorrectly considered because this factor is only allowed where the harm might result from physical characteristics. Here, the additional punishment was based on a threat of physical harm due to the notoriety of the case and on personal and professional consequences. Pet. App. at 59a-66a. Second, the Ninth Circuit held that the fact that Mr. Koon posed no criminal threat in the future should not have been considered as a basis for departing because the Sentencing Guidelines take recidivism into account in the criminal history score. Pet. App. at 67a-68a. Third, the Ninth Circuit held that the "spectre of unfairness" created by successive state and federal prosecutions was not correctly considered because the federal prosecution of Mr. Koon did not violate the Fifth Amendment prohibition against double jeopardy. Pet. App. at 68a-69a.

Thus, although none of these factors is expressly "forbidden" or "discouraged" by the Sentencing Guidelines, the Ninth Circuit held that the district court did not have discretion to consider them based on its own *de novo* review of the appropriateness of their being a factor in departing from the guidelines.

The Ninth Circuit held that even the five-level downward departure based on victim misconduct was disallowed despite the fact that departures for victim misconduct are specifically encouraged by the Guidelines. U.S.S.G. § 5K2.10. The Ninth Circuit, in a somewhat contradictory manner, then pointed out that: "We do not conclude that a departure for victim misconduct would *never* be permissible in a public case." Pet. App. at 76a n.38. By thus holding, it narrowly limited the circumstances which in its opinion would justify a departure to those instances when, for example, a police officer's partner is wounded or killed in his presence. Such a limitation is not contained in U.S.S.G. § 5K2.10 and is contrary to the general principles of departure as contained in the guidelines when a district judge determines that a case is not within the "heartland" of a particular guideline.

Under its *de novo* review, the Ninth Circuit created a new set of forbidden factors, based not on the Sentencing Guidelines, but on its own determination of what should be a factor in the district court's decision whether to depart.

Other circuits have also held that the district court's determination of whether a factor was adequately considered by the Sentencing Commission is subject to *de novo* review. *See*, *United States v. Thomas*, 49 F.3d 253, (6th Cir. 1995) ("A district court's determination that the guidelines adequately account for someone who is HIV positive is a question of interpretation which this court reviews *de novo*."); *United States v. Kohlbach*, 38 F.2d 832 (6th Cir. 1994) (review of sentence involves three-part test: 1) the district court's determination of whether the circumstances justify departure is reviewed *de novo*; 2) the factual findings justifying departure are reviewed under the clearly erroneous standard; and 3) the district court's degree of departure is reviewed for reasonableness); *United*

States v. Tsosie, 14 F.3d 1438 (10th Cir. 1994) (same three part test as in *Kohlbach*); *United States v. Thornburgh*, 7 F.3d 1471, 1473 (10th Cir. 1993) ("We review *de novo* whether the district court relied on an improper factor in deciding to depart."); *United States v. Lieberman*, 971 F.2d 989, 995 (3d Cir. 1992) (court engages in plenary review of district court's determination of whether a circumstance was adequately considered by the Sentencing Commission); *United States v. Diegert*, 916 F.2d 916 (4th Cir. 1990) (whether or not factors are extraordinary is a question of fact to which the clearly erroneous standard applies; whether or not a factor was adequately taken into consideration by the Sentencing Commission is a finding to which the *de novo* standard applies on appeal).

B. The First Circuit's Less Restrictive Standard of Review That Allows District Courts Discretion and Recognizes Their Superior "Feel" for Cases Has Been Adopted or Recognized as Persuasive by the Second, Seventh, Eighth, and District of Columbia Circuits

In *United States v. Rivera*, 994 F.2d 942 (1st Cir. 1993), then Chief Judge Breyer set out a much less strict test for review of district court's departures. The opinion discussed the history of the Sentencing Guidelines and noted that the Guidelines themselves anticipate out of the ordinary cases. When cases are extraordinary, district courts should be allowed to depart, subject only to a reasonableness review. *Id.* at 946.

The First Circuit then described how this analysis applied to the specific categories of departures set forth in the Sentencing Guidelines. *Id.* at 947-49. If the Sentencing Guidelines do not forbid, encourage or discourage consideration of a factor, the First Circuit concluded that the district court must make its best

judgment based on the structure and theory of the Guidelines, as well as the generally relevant sentencing factors and the basic purpose of sentencing:

> Ultimately, however, the Guidelines cannot dictate how courts should sentence in such special, unusual or other-than-ordinary circumstances. And that is as it should be. As we have said ... the very theory of the Guidelines system is that when courts, drawing upon experience and informed judgment in such cases, decide to depart, they will explain their departures. The courts of appeals, and the Sentencing Commission, will examine, and learn from, those reasons. And, the resulting knowledge will help the Commission to change, to refine, and to improve, the Guidelines themselves. That is the theory of partnership that the Guidelines embody.

Id. at 949-50. Unless a district court departs based on a "forbidden" factor, does not explain a departure based on a "discouraged" factor, or must engage in textual analysis of the words of a guideline, appellate courts must defer to the district court's decision, recognizing the district court's "superior 'feel' for the case." *Id.* at 950-51.

Other circuits have followed the *Rivera* "reasonableness" standard for review of district court's discretionary departures. *See United States v. Canoy*, 38 F.3d 893, 908 (7th Cir. 1994) ("when a district court explains the basis for its finding of an extraordinary family circumstance, that finding is entitled to considerable respect on appeal") (citing *Rivera*); *cf.*, *United States v. Kaye*, 23 F.3d 50, 52-53 (2d Cir. 1994) (noting that First Circuit "has adopted a standard of review requiring greater

deference" to district court departures but declining to reconsider *de novo* standard because "even our strict de novo review supports the District Court's departure"); *United States v. Goff*, 20 F.3d 918, 920 n.1 (8th Cir. 1994) (although Eighth Circuit has not adopted the *Rivera* approach, Judge Loken notes that "the author of this opinion agrees with the *Rivera* modification," but also notes it would not change result of the case); *United States v. Simpson*, 7 F.3d 813 (8th Cir. 1993) (pointing to *Rivera* as an "excellent analysis of the statutes and guidelines governing the district court's power to impose a departure from the Guidelines sentence and the appellate court's proper function on review"); *United States v. Spencer*, 25 F.3d 1105 (D.C. Cir. 1994) (pointing to *Rivera* as persuasive argument for the proposition that 18 U.S.C. § 3553(b) and U.S.S.G. § 5K2.0 are not as restrictive as other circuits interpret them).[4]

The *Rivera* standard of review maintains sufficient district court discretion to allow individualized sentencing. As the Supreme Court held in *United States v. Williams*, 112 S. Ct. 1112 (1992), although the Sentencing Reform Act established a limited appellate review of the sentencing decisions, it did not alter a court of appeals' traditional deference to a district court's exercise of its sentencing discretion.

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[4]The Fifth Circuit also applies a form of reasonableness test: "We affirm a departure from the Guidelines if the district court offers acceptable reasons for the departure and the departure is reasonable." *United States v. Ashburn*, 38 F.3d 803, 807 (5th Cir. 1994 (en banc) (internal citations omitted).

III. This Case Is A Suitable One For Resolving The Conflict

This case is representative of the situation faced by district courts when they consider whether a departure is appropriate. In this case, the district court departed downward from a range of 70-87 months to 30 months, based in part on victim misconduct, susceptibility to prison abuse, and loss of tenure and position. Each of these factors have been grounds for departure in other cases.

For example, some circuits have accepted the district court's better feel for the case and affirmed departures based on victim misconduct. *United States v. Yellow Earrings*, 891 F.2d 650, 653 (8th Cir. 1989) (affirming district court's eight-level downward departure based on victim's provocative conduct and rejecting government's arguments to overturn the district court as "border[ing] on the frivolous.")

Departures based on susceptibility to prison abuse have also been affirmed in the appellate courts. *United States v. Gonzalez*, 945 F.2d 525 (2d Cir. 1991) (affirming departure for a defendant who was small, feminine-looking, and had the appearance of a fourteen year old); *United States v. Lara*, 905 F.2d 599 (2d Cir. 1990) (affirming departure for a defendant who was small, appeared immature, and was bisexual leading prison officials to place him in solitary confinement for his own protection). *See also*, *United States v. Adonis*, 744 F. Supp. 336 (D.D.C. 1990) (district court departed downward based on vulnerability to prison abuse due to fact that defendant was mentally retarded and because of his limited intelligence, he was savagely beaten by other inmates). Indeed, the Ninth Circuit itself has implied that a departure based on vulnerability to prison abuse might be appropriate in certain circumstances. *United States v. Martinez-Guerrero*, 987 F.2d 618, 620 (9th Cir. 1993) (extraordinary physical impairment might be basis for departure, but concluding that legal blindness was not such an impairment).

The Ninth Circuit itself accepted a district court's departure based on loss of tenure and position. *See United States v. Aguilar*, 994 F.2d 609 (9th Cir.) (opinion of Judge O'Scannlain), *op. withdrawn*, 11 F.3d 124 (1993), and *op. replaced on reh'g en banc*, 21 F.3d 1475 (1994). Judge O'Scannlain approved the district court's downward departure based on loss of tenure and position, holding that the additional punishment to be imposed on Judge Aguilar was distinguishable from the ordinary "substantial pain and humiliation" suffered by criminal defendants and took the case outside the heartland. As Chief Judge Reinhardt pointed out in his dissent, the en banc court reversed Judge Aguilar's conviction and thus did not reach Judge O'Scannlain's determination of the downward departure.

While the facts of every case are going to be unique, these other cases demonstrate that the departure factors considered by the district court in this case are just the types of factors that district courts face in innumerable sentencing decisions. The lower courts need guidance in knowing whether to depart and what scrutiny is appropriate on appeal.

IV. The Viability Of The Sentencing Reform Act Will Be Threatened If District Judges Are Denied A Reasonable Measure Of Discretion

Many judges and commentators have expressed dissatisfaction with the Sentencing Guidelines.[5] The April 1990 report of the Federal Courts Study Committee found that of 270 respondents, 266 were against and only 4 were in favor of the Guidelines. *Federal Courts Study Comm., Report of the Federal Courts Study Committee* 133-44 (1990).

In a recent study sponsored by the Sentencing Commission itself, district courts expressed their dissatisfaction with the lack of discretion they retain under the Sentencing Guidelines. *U.S. Sentencing Commission, The Federal Sentencing Guidelines: A Report on the Operation of the Guidelines System and Short-term Impacts on Disparity in Sentencing, Use of Incarceration, and Prosecutorial Discretion and Plea Bargaining* 101-14 (1991). Of those surveyed, 48% identified reduction of judicial discretion as a problem with the Sentencing

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[5]*See,* e.g., Hon. Jose A. Cabranes, *Sentencing Guidelines: A Failed Utopian Experiment*, Nat'l L. J., July 27, 1992 at 2 (Circuit Judge, United States Court of Appeals for the 2d Circuit); Hon. Jack B. Weinstein, *A Trial Judge's Second Impression of the Federal Sentencing Guidelines*, 66 S. Cal. L. Rev. 357 (1992) (U.S. District Judge, Eastern District of New York); Judge Vincent L. Broderick, S.D.N.Y. & Judge Mark Wolf, D.Mass., Statement before the U.S. Sentencing Comm'n (March 5, 1991), in 3 Fed. Sentencing Rep. 276 (1991); Judge Edward R. Becker, 3d Cir., Statement to the U.S. Sentencing Comm'n on behalf of the Judicial Conference Comm. on Criminal Law and Probation Admin. (March 1990), in 2 Fed. Sentencing Rep. 238 (1990).

Guidelines.[6] *Id.* at 108. Responses included statements that judges have lost too much discretion under the guidelines, that it is too difficult to depart, or that discretion has been transferred from the judge to the prosecuting attorney or the probation officer. Of the 50 judges, 42% found that the Sentencing Guidelines were either too inflexible, too mechanical, or fail to take into account personal factors and therefore "dehumanize" the sentencing process. *Id.*

There are indications that judges may be finding ways to avoid the Sentencing Guidelines' ranges altogether, either by accepting plea agreements, even if they do not reflect the seriousness of the offense, or by departing in cases where there has been a waiver of appeal. *See* Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 Yale L. J. 1681, 1726 (June 1992).

It is therefore important that district courts be given the discretion in sentencing that Congress intended them to have. This case presents the Court with the opportunity to address this important issue and to clarify that appellate courts should engage in only limited review of departure decisions.

Marvin Frankel, the "father" of the Sentencing Guidelines, recently offered the following advice with regard to district court discretion under the Sentencing Guidelines:

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[6]65% of the 54 defense attorneys and 29% of the 66 probation officers surveyed also reported reduced judicial discretion as a problem. *Id.* at 110.

The judges on the firing lines are the ones who will ultimately make or break this effort. Their pressures to depart below the guidelines should be received more hospitably, at least for the time being, by both the Commission and the appellate courts. As I have mentioned, and as scholars have noticed, the courts of appeals have been notably narrow in their allowance of departures. That may be the right approach some day, but it is highly doubtful just now. Both the Commission and the courts of appeals should be responding more positively to the pressures from trial judges to increase their authority to mitigate.

As a compromise, my suggestion is ultimately that the power to depart *below the guidelines* ought to be more generously measured, certainly in the early years of the experiment. There is an ancient principle - not yet overruled, and I hope never to be overruled - that doubts in matters of criminal law ought to be resolved with a disposition toward lenity. That disposition is not rampant these days - with all the voices in the streets and on the bench shouting for the death penalty and other useless weapons in the war on crime. But it remains a fair and appropriate legal principle for the dark subject of crime and punishment. Mitigating departures ought to be presumed to be valid.

Marvin E. Frankel, *Sentencing Guidelines: A Need for Creative Collaboration*, 101 Yale L J 2043, 2050-51 (June 1992).

The Supreme Court should address the strict standard of review that the Ninth Circuit and other courts of appeal have applied to district court decisions to depart. This standard is contrary to Congressional intent and the statutory purposes of the Sentencing Reform Act, which was meant to provide discretion to trial judges. Moreover, by strictly reviewing district courts' discretionary departures, courts of appeal deny the Sentencing Commission the valuable information and insight of trial judges who are "on the firing lines" and who may have a better "feel" for the unique circumstances of the cases before them.

CONCLUSION

For the reasons stated in this brief, the Court should grant the petition for certiorari, reverse the judgment of the Court of Appeals, and reinstate the sentence imposed by the District Court.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

STACEY C. KOON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* ON BEHALF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF INTEREST OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

Amicus Curiae the National Association of Criminal Defense Lawyers ("NACDL") submits this brief in support of Stacey C. Koon's petition for a writ of certiorari with respect to the appropriate standard of appellate review of a district court's decision to depart from the United States Sentencing Guidelines (the "Guidelines") in the "unusual" or "atypical" case.

The NACDL is a national organization of over 8,000 criminal defense attorneys who practice in the federal and state courts. The NACDL is affiliated with 68 state and local criminal defense organizations with which it works cooperatively on issues related to the area of criminal defense and thus speaks for more than 28,000 criminal defense lawyers nationwide. Its members come from every state in the United States, as well as from Puerto Rico, the Virgin Islands, Guam and several foreign countries. The NACDL was formed in 1958 exclusively for charitable, scientific, educational and legislative purposes. Among other things, the NACDL seeks to promote the study of and research in the field of criminal defense law and procedure and constitutional law, to advance the knowledge of the law as it relates to the practice of criminal defense, to promote the proper and fair administration of criminal justice, to preserve, protect and defend the adversary system of justice and the Constitution, to maintain and foster an independent and able criminal defense bar, and to ensure justice and due process for persons accused of committing crimes.

The interest of the NACDL as *amicus curiae* in this case is limited to the issue of the appropriate standard of appellate review of a sentencing court's decision to depart from the Guidelines on the ground that unusual circumstances exist that permit departure. While the

NACDL certainly does not condone the activities for which petitioner Stacey C. Koon was charged and convicted, it believes that he, like any other citizen, is entitled to elemental fairness in the application of the law. Thus, the NACDL urges the Court to grant the petition for certiorari in order to establish a uniform standard of limited appellate review that will give substantial deference to a sentencing court's decision that circumstances exist that are of a "kind" or "degree" that warrant a departure from the Guidelines offense level. *See* 18 U.S.C. § 3553(b).[1] Given the frequency with which district courts are faced with applications for departures, both downward and upward, the standard of review is of significant importance to federal judges, defendants, defense attorneys, and prosecutors.

The written consent of both parties to this case, petitioner Koon and respondent United States, has been obtained for the filing of this petition.[2]

REASON FOR GRANTING THE WRIT

The Ninth Circuit's decision to vacate the district court's downward departures in this case is based upon an

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[1] The NACDL, although it has not briefed the issue, also requests that the Court reexamine the "dual sovereignty" exception to the double jeopardy clause and consider whether successive prosecutions in state and federal forums violates the Constitution.

[2] Accompanying this brief are Letters from Drew S. Days, III, Solicitor General, on behalf of the government, and Theodore B. Olson of Gibson, Dunn & Crutcher, on behalf of petitioner Koon, consenting to the filing of a brief *amicus curiae* by the NACDL.

impermissibly restrictive view of a sentencing court's authority to depart from the Guidelines. While the NACDL does not suggest that the district court should have unfettered discretion in applying the Guidelines with respect to departures, it does believe that district courts should retain, at a minimum, the degree of flexibility suggested by *United States v. Rivera*, 994 F.2d 942 (1st Cir. 1993) (Breyer, J.). Thus, the NACDL urges a standard of limited appellate review that will pay substantial deference to a sentencing court's determination of "'unusualness' with 'full awareness of, and respect for, the trier's superior "feel"' for the case.'" *United States v. Rivera*, 994 F.2d at 952 (quoting *United States v. Diaz-Villafane*, 874 F.2d 43, 50 (1st Cir.), *cert. denied*, 493 U.S. 862, 110 S. Ct. 177 (1989)).

The district court's familiarity with, and "superior feel" for, the particular case before it calls for the adoption of a narrow scope of appellate review of a sentencing court's departure decision. This same rationale underlies the standard of limited appellate review with respect to a district court's evidentiary decisions. Just as a district court's decisions involving evidentiary matters are given "substantial deference" because it, as opposed to an appellate court, has a better "feel" for the case from having participated in the proceedings that moved step-by-step toward the disposition that prompted the challenge on appeal, so too does a district court have a "superior feel" for an "unusual" or "atypical" case with respect to sentencing. *See, e.g., Bradley v. Secretary of Dept. of Health & Human Services*, 991 F.2d 1570 (Fed. Cir. 1993) (fact-finder has broad discretion in evidentiary determinations); *May v. Arkansas Forestry Com'n*, 993 F.2d 632, 637 (8th Cir. 1993) (appellate court must give "substantial deference" to district court's evidentiary rulings); *Gracia v. Lee*, 976 F.2d 1344, 1345 (10th Cir.

1992) (district court accorded "considerable deference" in evidentiary matters); *Adams v. Sewell*, 946 F.2d 757, 768 (11th Cir. 1991) (district court accorded "great discretion" in evidentiary rulings); *Rent-A-Center, Inc. v. Canyon Television & Appliance Rental, Inc.*, 944 F.2d 597, 601 (9th Cir. 1991) ("broad discretion" accorded district court's evidentiary determinations); *cf. Illinois v. Gates*, 462 U.S. 213, 236, 103 S. Ct. 2317, 2331 (1983) ("A magistrate's 'determination of probable cause should be paid great deference by reviewing courts,'" quoting *Spinelli v. United States*, 393 U.S. 410, 413, 89 S. Ct. 584, 590 (1969)).

Further, a sentencing court has a special competence and expertise in determining whether the particular case before it is "unusual" or "atypical" because it, unlike an appellate court, is "likely to have seen more *ordinary* Guidelines cases, for appellate courts hear only the comparatively few cases that counsel believe present a colorable appeal." *Rivera*, 994 F.2d at 951. Thus, the deference that should be accorded a sentencing court's decision on departure matters in the unusual case is simply an acknowledgment that district courts generally are in the best position to recognize atypical cases. *See Rivera*, 994 F.2d at 950.

The NACDL does not believe that the adoption of a standard of limited appellate review would result in a rash of departures by sentencing courts as a means to avoid the dictates of the Guidelines, nor does it believe that more downward departures necessarily would be upheld than upward departures.[3] A uniform standard of limited

[3] According to the latest (1993) Annual Report of the Sentencing Commission, the vast majority of sentences are imposed within the Guidelines' range. According to that Report, 75.3% of defendants nationwide are sentenced within the Guidelines range, 6.6% receive downward departures (not including 16.9% who receive downward departures for substantial assistance to the prosecution), while 1.1% receive upward departures. *See* U.S. Sentencing Commission FY 1993 Data File, Appendix B, 1993 Annual Report of United States Sentencing Commission. In the Ninth Circuit, the Circuit from which this matter comes, 76.98% of defendants are sentenced within the Guidelines range, while 8.09% receive downward departures (not including the 13.57% who receive downward departures based upon substantial assistance), and 1.36% receive upward departures. In the First Circuit, 79.18% of defendants are sentenced within the Guidelines range, while 5.26% receive downward departures (not including 13.52% based upon substantial assistance), and 2.0% receive upward departures. Since *Rivera* was decided in 1993 and *Koon* in 1994, it is doubtful that any conclusion about the effect of a different scope of review could be reached from these statistics.

appellate review, however, would lead, we believe, some district judges to be less hesitant to depart from the Guidelines in an "unusual" case.

The NACDL supports a deferential standard of limited appellate review as suggested by *Rivera* rather than a more rigid standard that would have the effect of placing a "straitjacket" on a sentencing court, "compelling it to impose sentences like a robot inside a Guidelines' glass bubble, preventing it from exercising discretion, flexibility or independent judgment.'" *United States v. Jagmohan*, 909 F.2d 61, 65 (2d Cir. 1991) (quoting *United States v. Lara*, 905 F.2d 599, 604 (2d Cir. 1990)).

In its support of such a limited scope of appellate review, the NACDL does not contend that the standard suggested by *Rivera* is necessarily the one that the Court should adopt. It does believe, however, that the limited scope of review suggested by *Rivera* is reasonable and properly recognizes the experience and special competence

of sentencing courts to view the particular factors in each case, singly or in combination, in terms of the gestalt of the entire case. As recognized by *Rivera*, it is the sentencing court's unique position--its experience and special competence with respect to the particular case--that permit it to impose a just and equitable sentence, the goal of the Sentencing Commission in formulating the Guidelines. *Rivera*, 994 F.2d at 951-52. As the title "Guidelines" itself implies, the Guidelines should be a guide, not a set of commandments, for the sentencing court to follow when determining the appropriate sentence.

A uniform discretionary standard of limited appellate review of departure decisions would be consistent with the spirit and the letter of the Guidelines while requiring an appellate court to give due respect to a sentencing court's departure decision "in a spirit of humility occasioned by not having participated in what has gone before." *Founding Church of Scientology of Wash. D.C., Inc. v. Webster*, 802 F.2d 1448, 1457 (D.C. Cir.) (applying discretionary standard to district court's evidentiary decisions), *cert. denied*, 484 U.S. 871, 108 S. Ct. 199 (1986).

CONCLUSION

For the foregoing reasons, the NACDL respectfully requests that the Court grant petitioner Koon's application for certiorari and, upon hearing this matter, establish a uniform standard of limited appellate review of district court decisions to depart from the Guidelines in the "unusual" or "atypical" case.

June 19, 1995

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No. 94-1664

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

STACEY C. KOON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS, INC. IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF THE NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS

Amicus Curiae the National Association of Police Organizations, Inc. (hereinafter "NAPO") submits this brief in support of Stacey C. Koon's petition for issuance of this Court's writ of certiorari to the United States Court of Appeals for the Ninth Circuit with respect to the use of a law enforcement officer's administratively compelled testimony against him at trial.

NAPO is a nationwide association of labor and trade organizations representing state, local and federal law enforcement officers. Among other entities, NAPO represents the Los Angeles Police Protective League, the certified labor bargaining agent representing the bargaining unit which includes petitioner Koon. NAPO also represents law enforcement officers throughout the rest of the state of California, the territory of the Ninth Circuit, and the United States. Through its state and local affiliates, NAPO actively represents approximately 185,000 sworn law enforcement officers throughout the country. In 1994, NAPO founded the National Law Enforcement Officers Rights Center, which advocates the necessity of assuring fundamental due process rights for law enforcement officers in the face of increasing political pressures for the investigation and prosecution of police.

NAPO has an important interest in this case, as the case presents issues concerning the fundamental and constitutional rights to due process enjoyed by law enforcement officers as

much as by any other individuals, which, unfortunately, have been and are in increasing danger of erosion due to prosecutorial reaction to perceived public "outrage" towards police. Internal police department investigation into the conduct of individual officers is routine. Civil and criminal prosecution of individual officers is rapidly increasing at both the state and federal levels. Officers' rights are in grave danger of being sacrificed on the altar of political expediency. A clear enunciation of the rights enjoyed by individual officers accused of wrongdoing is of crucial value to the officers represented by NAPO, as well as to the various departmental, judicial, defensive and prosecutorial entities involved.

NAPO has received the written consent of both petitioner Koon and respondent the United States of America to the filing of this brief as required by Rule 37.2 of the Rules of this Court. Copies of both consents are appended hereto as exhibits following the text of this brief.

SUMMARY OF ARGUMENT

The Ninth Circuit's affirmance of petitioner's federal criminal conviction in the face of the government's concession that at least one prosecution witness had been provided with a transcript of petitioner's admittedly compelled testimony prior to testifying[1] and despite the lack of the government's showing that that witness's testimony had not been shaped, altered or affected in any way, directly or indirectly, by knowledge of the contents of petitioner's compelled statement is based upon an unduly restrictive application of the protections of the Fifth Amendment's Self-Incrimination Clause and conflicts with other circuits and at least one state court of last resort. *United States v. Koon*, 34 F.3d 1416 (9th Cir. 1994), *reh'g denied*, 45 F.3d 1303 (9th Cir. 1995). The affirmance, if left uncorrected, will also have a profound chilling effect on the exercise and assertion of the Fifth Amendment's guarantee against compelled self-incrimination by individual officers and will upset the extant framework within which police department internal investigations are conducted throughout this country.

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1 *See*, Unreported Order of the District Court allowing prosecution witness Timothy Briseno's testimony against petitioner although Briseno previously received and read testimony of petitioner which had been compelled by internal affairs investigators, reprinted as Appendix F of the *Petition for Writ of Certiorari* in *Koon v. United States*, Case No. 94-1664 at pages 156a-158a.

ARGUMENT

Individual law enforcement officers execute their official duties under the greatest scrutiny. Their actions, both public and private, are continuously monitored and investigated by their own departments, civilian and professional review boards, state and local regulatory commissions, the print and electronic media, and state, local and federal investigators and prosecutors. This scrutiny has intensified within the last few years as isolated cases involving controversial police actions, including the case at bar, are cited as proof by some that all police cannot be trusted, that all police are brutal, or that all police are racist. Neither this Court nor the people of this nation would stand for such painting with a broad brush of other identifiable groups of individuals. Yet it has become sadly fashionable to negatively stereotype law enforcement officers in a way that would be intolerable if applied to African-Americans, women, Jews, Catholics, homosexuals, persons with disabilities or the elderly. State and federal prosecutors, not immune from the political pressures of the times, are at least tempted to afford individual law enforcement officers accused of wrongdoing a little less due process than another person similarly situated might receive.

The federal courts of this country have traditionally been a place of vindication for the rights of the politically unpopular individual. In 1967, in another time of popular dissatisfaction with governmental policy being directed at individual representatives of the lawful authority of government, be they individual police officers or soldiers, this Court took the significant step of announcing what might seem

a self-evident truth: "[T]hat policemen, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights." *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967). *Garrity* and its progeny have yielded a familiar and workable legal framework, well-grounded in the Constitution, for the securing by internal investigators of testimonial evidence from officers who may have knowledge of police misconduct. *See, e.g., United States v. Camacho*, 739 F.Supp. 1504, 1512-15 (S.D.Fla. 1990) (outlining settled constitutional standards of internal police investigations). This effective and constitutional procedure was initially followed in the investigative stages of the case at bar, and proved no obstacle to the *lawful* investigation and prosecution of alleged criminal misconduct. The prosecution grievously erred, however, once it introduced testimony against the petitioner from a witness who had received and read the petitioner's administratively compelled statements regarding the facts of the case.

Under the *Garrity* process, individual officers may be compelled to testify regarding allegations of misconduct, on pain of losing their jobs should they refuse, consistent with the Constitution only when those statements are immunized from use, "directly and indirectly", against the officer in any subsequent criminal proceeding. *Garrity*, 385 U.S. at 500. *Kastigar v. United States*, 406 U.S. 441, 453 (1972). Internal affairs investigators, prosecutors, defense attorneys, union representatives and individual officers are familiar with and understand the practical as well as constitutional dimensions of being called in and compelled to testify about allegations of police misconduct. *See*, Warnken, *The Law Enforcement*

Officers' Privilege Against Compelled Self-Incrimination, 16 U.Balt.L.Rev. 452, 492-515 (1987) (survey of various state statutes codifying constitutional procedures mandated by *Garrity*); *Rights of Police Officers During Internal Investigations: Hearing before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary*, 102nd Cong., 2nd Sess., *passim* (1992) (testimony of witnesses reflecting status of police internal investigative procedure across country). The fact that the individual officer's testimony may not be used against him or her in a subsequent criminal prosecution does not prohibit the police department from appropriately disciplining the officer, including terminating him or her from employment. Nor does the fact that the particular statement and its fruit are prohibited to be used against the officer in a subsequent criminal proceeding prevent the investigation, arrest, charging, prosecution, conviction and punishment of the officer, through independent, non-compelled self-incriminating testimony or any other *lawful* means.

Federal investigators and attorneys in particular have become particularly practiced and adept at isolating Fifth Amendment violation-tainted evidence from trial prosecutors as well as other investigators who are continuing to actively work the case. *See*, Unreported Order of the District Court Granting [Petitioner's] Request for *Kastigar* Hearing, reprinted as Appendix E of the *Petition for Writ of Certiorari* in *Koon v. United States*, Case No. 94-1664 at pages 151a-153a. Most significantly, state and federal prosecutors have proved able in fact to secure convictions against officers guilty of criminal misconduct by *lawfully* and *constitutionally* prosecuting those

officers. Just as police have found that honoring suspects' constitutional rights has not frustrated their ability to secure arrests and convictions, so prosecutors have learned that defendants, including accused police officers, can be successfully prosecuted by *constitutional* means as a *practical* matter.

It being well-settled that the Fifth Amendment's protections may be properly demanded *by* individual police officers as legitimately as those protections may be demanded *of* police officers, officers, departments, investigators, courts and prosecutors have come to rely upon the settled law in this area to guide them in the administration of internal and administrative matters to a degree not found in any other profession. Seen in this context, the Ninth Circuit's circumscription of the extent of the protection of the Fifth Amendment's Self-Incrimination Clause is a matter of profound concern to law enforcement. At the individual level, officers, like all other persons in the Ninth Circuit, now reside under a judicial interpretation of the constitution that expressly refuses to recognize fundamental due process protections to the same extent as recognized by other circuits and state courts of last resort. *See, United States v. North ("North I")*, 910 F.2d 843, *modified, United States v. North ("North II")*, 920 F.2d 940 (D.C. Cir. 1990), *cert. denied*, 500 U.S. 941 (1991) (discussing government's high but proper burden of proof in demonstrating that no direct or indirect use of immunized testimony against accused occurred); *United States v. Poindexter*, 951 F.2d 369 (D.C. Cir. 1991), *cert. denied*, 113 S.Ct. 656 (1992); *United States v. Schmidgall*, 25 F.3d 1523 (11th Cir. 1994); *State v. Vallejos*, 883 P.2d 1269 (N.M. 1994) ("A prohibited use of

immunized testimony 'occurs if a witness's recollection is refreshed by exposure to the defendant's immunized testimony, or if his testimony is in any way "shaped, altered or affected," by such exposure.'") (quoting *Poindexter*, 951 F.2d at 373 (quoting *North I*, 910 F.2d at 863)), *But see, United States v. Bartel*, 19 F.3d 1105 (6th Cir.), *cert. denied*, 115 S. Ct. 113 (1994) (declining to require government to prove witness's testimony not in any way influenced by exposure to immunized testimony).

At the organizational level well-established, workable and effective means of addressing allegations of misconduct while honoring individual officers' fundamental rights are in substantial danger of being thrown into chaos because of the uncertainty injected into the system by the Ninth Circuit's ruling. At the professional level attorneys, police administrators, union representatives and shop stewards stand unsure of the status of the law and uncertain how best to advise officers and other clients regarding this most fundamental right. While some uncertainty may be inherent in advising clients of their rights under the law, this Court ought to grant the opportunity to clarify those rights when possible, as here.

This opportunity is all the more imperative when such a clarification would serve to vindicate the rights of persons who, despite being viewed as presently unpopular, or, rather, because of that fact, are especially in need of our constitution's protections.

CONCLUSION

For the foregoing reasons, *amicus curiae* the National Association of Police Organizations respectfully requests that the Court grant petitioner Koon's application and issue its writ to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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NO. 94-1664

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

STACEY C. KOON,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF AMICUS CURIAE OF THE VILLAGE OF HOFFMAN ESTATES, ILLINOIS an Illinois Municipal Corporation IN SUPPORT OF THE PETITIONER

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TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF AMICUS CURIAE
OF THE VILLAGE OF HOFFMAN ESTATES, ILLINOIS
an Illinois Municipal Corporation

This brief is filed pursuant to the authority granted by Rule 36.5 of the Rules of the Supreme Court of the United States by the Village of Hoffman Estates, Illinois, an Illinois municipal corporation.

INTEREST OF AMICUS CURIAE

The Village of Hoffman Estates, Illinois (hereinafter called "Hoffman Estates") is a municipality with a population of approximately 48,000 persons. Hoffman Estates is situated in the northwest suburbs of Chicago, Illinois. Under the Illinois Constitution of 1970, Hoffman Estates is a home rule unit of government.

Hoffman Estates employs 410 employees, 100 of whom are Police Officers. The Department Directors generally and the Police Chief specifically are required to conduct internal investigations of alleged employee misconduct from time to time. A *Garrity* admonition is required by the Seventh Circuit Court of Appeals, state statutes and labor agreements prior to ordering a statement from an employee. The employee is advised that any statement or fruit of such statement cannot be used against him in a criminal proceeding but that he is subject to disciplinary action if he refuses to give a statement.

The conflict of circuits created by the Ninth Circuit Court of Appeals rule on "use" of statements in a criminal proceeding, in contradiction of the District of Columbia Court of Appeals rule on "use" of statements in a criminal proceeding, puts in jeopardy the ability of municipal governments to order answers to questions related to the integrity and efficiency of the municipality. This has resulted because the Ninth Circuit Court of Appeals has created an "independent source exception" to use immunity, and the statement and fruits can be used against the employee if an independent source exists.

Charges of insubordination of employees remaining silent after the *Garrity* admonition will not be upheld if the use immunity is an empty promise under the Ninth Circuit Court of Appeals rule. Hoffman Estates respectfully asks this Court to consider the day-to-day problems created by the Ninth Circuit Court of Appeals ruling and set a clear standard for "use" immunity based upon the District of Columbia Court of Appeals standard for all jurisdictions.

ARGUMENT

I

THE WRIT SHOULD BE GRANTED TO RESOLVE THE CONFLICT AMONG THE CIRCUITS REGARDING THE SCOPE OF USE IMMUNITY FROM COMPELLED STATEMENTS.

The promise of *Garrity v State of New Jersey*, 385 U.S. 493 (1967) that policemen "are not relegated to a watered-down version of constitutional rights" (385 U.S. at 500) rings hollow in the Ninth Circuit. That Court in *United States v Koon*, 34 F.3d 1416 (9th Cir.-1994) distinguished its view of compelled testimony from the standard of the District of Columbia Circuit in *United States v North* ("North I") 910 F2d 843 modified ("North II") 920 F2d 940 (D.C. Cir.-1990) cert. denied, 500 U.S. 941 (1991) by stating that the *Kastigar* burden is met by

Recent challenges by police officers to the "use" of their internal investigation statements at a grand jury and the extent of protection afforded indicate the concern that public employees and employers have to the use and extent of "use" immunity, *In Re Grand Jury Subpoenas v United States*, 40 F3d 1096 (10th Cir.-1994) and *In Re Grand Jury Proceedings v United States*, 45 F3d 343 (9th Cir.-1995).

Because of the Ninth Circuit's "independent source exception" rule of use immunity, officers and their associations are reticent to fully cooperate in internal investigations and have taken to "Garritizing" themselves prior to answering routine inquiries of supervisors when giving answers. Additionally, in formal and informal inquiries, officers are not being fully responsive to legitimate questions relating to job performance. The F.O.P. and other associations distribute "Garrity" cards to officers to preface responses and reports due to the fears of abuse of the use immunity. An example is the San Antonio Police Officers Association Card, as follows:

> It is my understanding that this report is made for administrative, internal police department purposes only and will not be used as part of an official investigation. This report is made by me after being ordered to do so by lawful supervisory officers. It is my understanding that by refusing to obey an order to write this report that I can be disciplined for insubordination, and that the punishment for insubordination can be up to and including termination of employment. This report is made only pursuant to such orders and the potential punishment/discipline that can result for failure to obey that order.

For effective law enforcement administration and protection of the rights of all public employees, the Court should resolve the conflict in the standard of review for use immunity between the *North* court and the *Koon* court as well as other circuit courts of appeals cited in the Petition.

CONCLUSION

Amicus submits that the judgment of the court below should be reviewed so that a consistent standard for use immunity under *Kastigar* can be established and that the District of Columbia Circuit's standard in *North* be adopted.

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Nos. 94-1664 and 94-8842

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LAURENCE M. POWELL

Petitioners,

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UNITED STATES OF AMERICA,

Respondent

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS, INC. IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST OF THE NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS

Amicus Curiae the National Association of Police Organizations, Inc. (hereinafter "NAPO") submits this brief in support of Stacey C. Koon and Laurence M. Powell's petitions for reversal of the judgement in this case of the United States Court of Appeals for the Ninth Circuit which vacated the original sentences of petitioners and remanded their cause for resentencing.

NAPO is a nationwide association of labor and trade organizations representing state, local and federal law enforcement officers. Among other entities, NAPO represents the Los Angeles Police Protective League, the certified labor bargaining agent representing the bargaining units which include petitioners Koon and Powell. NAPO also represents law enforcement officers throughout the rest of the state of California, the Ninth Circuit, and the United States. Through its state and local affiliates, NAPO actively represents approximately 185,000 sworn law enforcement officers throughout the country. In 1994, NAPO founded the National Law Enforcement Officers' Rights Center, which advocates the necessity of assuring fundamental due process rights for law enforcement officers in the face of increasing political pressures for the investigation and prosecution of police.

NAPO has an important interest in this matter, as the case presents issues the resolution of which will define the extent to which the particular and unusual circumstances attendant upon the criminal prosecution and conviction of a police officer may be properly taken into consideration by a

trial court in passing sentence.

Internal police department investigation into the conduct of individual officers is now routine. Civil and criminal prosecution of individual officers is rapidly increasing at both the state and federal levels. Such cases frequently attract intense publicity and are likely to arouse prolonged and emotional public debate. Officers' basic rights are often in danger of being sacrificed on the altar of political expediency. A clear enunciation of the rights secured to individual officers accused of wrongdoing is of crucial value to the officers represented by NAPO, as well as to the various departmental, judicial, defensive and prosecutorial entities involved.

NAPO has received the written consent of petitioners Koon and Powell and of respondent the United States of America to the filing of this brief as required by Rule 37.3 (a) of the Rules of this Court. The original copies of all consents have been filed with the Clerk of the Court as required by that Rule.

SUMMARY OF ARGUMENT

The United States Sentencing Guidelines are not intended to be, nor do they constitute, an exhaustive, finite and exclusive set of factors to be considered by a trial court in passing sentence. The full range of human conduct and circumstance which might prove relevant to the determination of an appropriate sentence for a given offense is too vast and complex to be completely anticipated in any finite compilation of precepts. This is particularly true in the extraordinary case of the sentencing of a police officer for *criminal* federal civil rights misconduct in the course of duty.

Several factors unique to the offense and actors in this case were properly considered in this case by the original sentencing court below. These factors of provocation and victim misconduct were not already incorporated into the relevant Guidelines by the United States Sentencing Commission. The petitioners are also at unique and extreme risk in prison and have suffered additional punishments beyond their prison terms because of the fact that they are former law enforcement officers. These factors constitute circumstances which were properly taken into account by the trial court in determining an appropriate sentence in this case.

Under either a deferential or *de novo* standard of review, they remain viable and appropriate circumstances for consideration by a sentencing court and provide ample justification for the departure sentences meted out to the petitioners in this matter.

ARGUMENT

I. PROVOCATION AND VICTIM MISCONDUCT.

A. The Ninth Circuit erred in concluding that "provocation" or victim misconduct is included in the base offense level for U.S.S.G. § 2H1.4, 18 U.S.C.A.App., so that such a circumstance can only justify a downward departure in the most extreme case.

Without any data whatsoever, nor any support from the publications of the United States Sentencing Commission (hereinafter "the Commission"), the Ninth Circuit concluded that some degree of provocation or victim misconduct was typical of most criminal violations of 18 U.S.C. § 242. Accordingly, the Court of Appeals concluded that victim misconduct could be a ground for departure only in the most extreme of cases. This holding is manifestly incorrect and inconsistent with the United States Sentencing Guidelines and policy statements promulgated by the Commission..

1. Chapter Five of the Guidelines demonstrates that the Commission did not take victim conduct into account in formulating U.S.S.G. § 2H1.4, 18 U.S.C.A.App. (1989).

Policy Statement U.S.S.G. § 5K2.0 p.s., 18 U.S.C.A.App. (Grounds for Departure)[1] provides in relevant

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[1] Citations are to the version of the United States Sentencing Guidelines (hereinafter "the Guidelines") and policy

part:

> The controlling decision as to whether and to what extent departure is warranted can only be made by the courts. Nonetheless, this subpart [5K2] seeks to aid the court by identifying some of the factors that the Commission has not been able to take into account fully in formulating the guidelines . Any case may involve factors in addition to those identified that have not been given adequate consideration by the Commission. Presence of any such factor may warrant departure from the guidelines, under some circumstances, in the discretion of the sentencing court. Similarly, the court may depart from the guidelines, even though the reason for departure is taken into consideration in the guidelines (e.g., as a specific offense characteristic or other adjustment), if the court determines that, in light of unusual circumstances, the guideline level attached to that factor is inadequate.

Section 5K2.10 (Victim Conduct) expressly sanctions a downward departure "[i]f the victim's conduct contributed substantially to provoking the offense behavior." It does not preclude reliance on this ground for departure with respect to any offense. Section 5K2.10 does state that "[v]ictim misconduct *ordinarily* would not be sufficient to warrant

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statements which took effect on November 1, 1989, unless otherwise expressly noted.

application of this provision in the context of [sexual abuse cases]" and "*usually* would not be relevant in the context of non-violent offenses" (emphasis added). But this language only reinforces the conclusion that the Commission anticipated that victim provocation *would* often be a ground for departure in other cases, including the offenses at issue here.

Together, §§ 5K2.0 and 5K2.10 mean that, unless otherwise specified in the Guidelines, the Commission did not take into consideration victim provocation in formulation of the Guidelines. Victim provocation is not a specific offense characteristic for any of the civil rights violation Guidelines nor for any other offense. Similarly, none of the Guidelines, official commentary or any other Commission publication indicate that victim provocation is included in the base offense level.[2] Only one offense for which there is a Guideline, voluntary manslaughter (§ 2A1.3), necessarily includes some form of provocation as an element. And the provocation inherent in voluntary manslaughter results in a ten-level reduction, from 38 to 28, compared to the offense level for the otherwise most analogous offense, that of second-degree

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[2] Had the Commission instead believed the absence of provocation to be an aggravating factor, it almost certainly would have said so. This is because the Commission recognized that courts would be more reluctant to depart above the Guidelines than below. *See* the Commission's *Supplementary Report to Congress on the Initial Sentencing Guidelines and Policy Statements*, June 18, 1987 (hereinafter "*Supplementary Report*"), at 66 ("The possibility of reversal on appeal might make departure above the guidelines rare (occurring primarily in truly extreme cases), while departures below the guidelines likely would be more frequent.").

murder (§ 2A1.2).

An examination of § 5K2.10 suggests that the Commission chose not to provide a specific adjustment for victim misconduct because doing so was impractical and unimportant. Section 5K2.10 lists five factors, all of them highly case-specific, which should be considered in determining whether, and to what extent, to depart. It simply is not possible to write a guideline to assign a single number to such an adjustment. And there is no real need to do so, considering that the types of offenses to which it might be applied form a negligible percentage of the cases prosecuted in the federal courts.[3] In addition, the *Supplementary Report* does not quantify the effect of victim provocation in the sample of cases analyzed by the Commission, implying that the Commission lacked adequate data to do so. *See Supplementary Report* at 27-39.[4] By adopting a policy statement approving a non-specific downward departure for victim misconduct, the

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[3] The Commission's decision to mandate a ten-level reduction for the provocation inherent in voluntary manslaughter does not detract from this conclusion. In dealing with voluntary manslaughter, any reduction made by the Commission *vis-a-vis* the Guideline for second-degree murder would be a quantified reduction based on victim provocation *by definition*. The Commission's choice of ten levels was, moreover, far more lenient than the district court's five-level departure in the case at bar.

[4] The tables in the *Supplementary Report* do, however, show that in the analogous comparison between second-degree murder and manslaughter, the data supported an average eight-level reduction for provocation. *Id.* at 27.

Commission not only encouraged district courts to reduce sentences for this reason, but allowed them to tailor the adjustment to the facts of each case.

2. The history of U.S.S.G. § 2H1.4 also demonstrates that the Commission in fact did not take victim misconduct into account when formulating that Guideline; and victim misconduct is a proper ground for departure from that Guideline.

It is readily apparent that the Commission did not take into consideration victim misconduct when formulating the Guideline for violations of 18 U.S.C. § 242. Victim provocation is not an element of these offenses, which clearly can occur without it. The presence or absence of victim misconduct is, as the trial court recognized, a highly significant factor in evaluating the egregiousness of the offense, as well as the dangerousness of the offenders. Yet the Guidelines do not discuss provocation in the context of civil rights offenses.

In setting the Guidelines for civil rights offenses, the Commission used a broad-brush approach. "[A] review of civil rights cases led the Commission to conclude that the guidelines for such offenses primarily should be tied to those for the underlying crimes, with an increase to reflect the civil rights violation as an aggravating factor." *Supplementary Report* at 18. Such an approach implicitly carries with it an acceptance of the adjustments, including grounds for departure, applicable to the underlying offense, and the Guidelines now expressly state that, when a Guideline is cross-referenced, all adjustments from Guidelines Chapters Two and Three also apply. *See* U.S.S.G. § 1B1.5 18 U.S.C.A.App. (1993) ("An instruction to

use the offense level from another offense guideline refers to the offense level from the entire offense guideline (i.e., the base offense level, specific offense characteristics, cross-references, and special instructions) . . . If the offense level is determined by a reference to another guideline . . . the adjustments in Chapter Three (Adjustments) also are determined in respect to the referenced offense guideline, except as otherwise expressly provided."). Violations of 18 U.S.C. § 242 may or may not involve violence, and the Commission was aware that victim provocation generally would be an appropriate ground for departure when the victim's conduct evoked a violent reaction. Given that a civil rights offense would clearly be more serious if wholly unprovoked, the Commission's decision to tie the Guidelines for *all* civil rights violation cases to the characteristics of the underlying offense (as opposed to treating civil rights violations cases as independent offenses in their own right) is indicative of the Commission's failing to adjust for, and *a fortiori* to consider, victim provocation or misconduct as a factor inherent in civil rights offenses committed by police. This is exactly what § 5K2.10 addresses.

The conclusion that § 2H1.4 does not take victim misconduct into account finds further support in the history of the amendments to the civil rights Guidelines. As originally promulgated, § 2H1.4 provided for a base offense level of 10 or 2 plus the level applicable to any underlying offense, whichever is higher. In the 1989 amendments, this was changed to 10 or 6 plus the level applicable to any underlying offense, whichever is higher. The rationale for this amendment was to make the Guideline sentence consistent with the Guideline sentence for other civil rights offenses if those

offenses were committed by a person acting under color of authority. Thus, in proposing the amendment, the Commission stated:

> Reason for Amendment: This amendment corrects an anomaly between the offense level under this section and § 2H1.5 [Other Deprivations of Rights or Benefits in Furtherance of Discrimination] . . . Section 2H1.4 is similar to § 2H1.5 in that it may or may not involve the use of force. Under § 2H1.4 however, the offense must involve the abuse of actual or purported legal authority. The base offense level of 10 used in § 2H1.4(a)(1) has a built-in 4-level enhancement (which corresponds to the base offense level of 6 under § 2H1.5(a)(1) plus the 4-level increase for a public official). There is an anomaly, however, when the base offense level from (a)(2) is used. In such cases, § 2H1.4 results in an offense level that is 4 levels less than § 2H1.5 when the offense is committed by a public official.

54 Fed. Reg. 21348, 21366 (1989).[5]

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[5] The Commission also erred in analogizing violations of 18 U.S.C. §§ 241, 242 to the offenses covered by the other civil rights Guidelines, since no discriminatory motive is required. The absence of proof of a discriminatory motive here would thus support a two-level downward departure.

As so amended, § 2H1.4 produces the same offense level for a public official as do § 2H1.1 (Conspiracy to Deprive of Civil Rights; Going in Disguise to Deprive of Civil Rights) and § 2H1.3 (Use of Force or Threat of Force to Deny Benefits or Rights in Furtherance of Discrimination), as well as § 2H1.5. Yet many of these offenses, especially ones that fall under § 2H1.1, could involve provocation only remotely, if at all. It is unreasonable to believe that the four-level increase for offenses committed by public officials assumes provocation when the offense is violent and unpremeditated, when it obviously does not do so in other circumstances. Because offenses that fall under § 2H1.5 and the other Guidelines in Part 2H would be quite unlikely to involve provocative victim conduct, whereas those falling under § 2H1.4 might or might not, the Commission's decision to equate all these offenses evinces a failure to take victim misconduct into account in formulating § 2H1.4.

B. In any event, the Ninth Circuit misconstrued the scope and breadth of the Guideline § 5K2.10 policy statement.

As Judge Reinhardt stated in his dissent from the denial of rehearing *en banc* below, "[t]he panel's analysis of the five-point departure . . . is premised on a highly restrictive and inflexible reading of the Guidelines . . . The panel reversed Judge Davies' [*sic*] departure, holding that, in the context of excessive force cases, an act provokes only if it precipitates an immediate response." *United States v. Koon*, 45 F.3d 1303 at 1307. More specifically, the Ninth Circuit opined:

> A close examination of the district court's

sentencing memorandum reveals that the court ultimately did not conclude that [petitioners] were provoked in precisely the manner contemplated by § 5K2.10 . . . . [Although the district court found "that [the victim's] wrongful conduct was the initial provocation for the subsequent course of events."] the court found that those factors were no longer present when the [petitioners'] conduct became criminal. The court recognized that by the time Powell struck, and Koon permitted to be struck, those blows for which [petitioners] were criminally liable, [the victim] no longer presented a danger, and was no longer persisting in misconduct. [¶] The district court thus determined not that [the victim's] misconduct "provoked" the offense conduct -- the "provocative" behavior had "subsided" before [petitioners] committed their criminal acts -- but that "the incident would not have escalated to this point, indeed, it would not have occurred at all, but for [the victim's] initial misconduct."

United States v. Koon, 34 F.3d 1416 at 1459 (9th Cir. 1994), *reh'g denied*, 45 F.3d 1303 (9th Cir. 1995). The Ninth Circuit not only mischaracterized the trial court's findings, but also misread the policy statement, which clearly is *not* "precise" but rather expansive, allowing for departure in a broad range of circumstances. As Judge Reinhardt recognized, "[t]he applicable policy statement plainly rejects the requirement of a tight nexus between the provocative behavior and the resulting unlawful conduct." 45 F.3d at 1307. Indeed, §

5K2.10 expressly endorses departure in circumstances that fall far short of the standard the Ninth Circuit would impose, such as when "an extended course of provocation and harassment [leads] a defendant to steal or destroy property in retaliation." The supposed requirement that the defendant's reaction be in immediate response to the victim's misconduct in order to successfully plead provocation as a defense was rejected long ago. *See e.g., People v. Maher*, 10 Mich. 212 (1862). Similarly, § 5K2.10 in no way requires an immediate reaction to the provocative conduct. To read such requirements into the section, which is broadly worded and deals merely with mitigation in sentencing, is insupportable.

Even if such a requirement did exist, however, it would have been met here. The district court found that the total time which elapsed between the point at which the victim ceased his wrongful conduct and the time the petitioners' unlawful conduct began was a mere twelve seconds. *See Sentencing Memorandum*, Appendix C to the *Petition for Writ of Certiorari* in *Koon v. United States*, Case No. 94-1664 (hereinafter "*Sentencing Memorandum*"), pages 101a-102a, 107a. Thus, not only is the Ninth Circuit's reading of the policy statement in error, but the factual predicate for its conclusion is missing.

The Ninth Circuit relied on *Graham v. Connor*, 490 U.S. 386 (1989), to support the proposition that, in excessive force cases, conduct does not violate the civil rights statutes unless it is unreasonable. While that may be true, it is also beside the point. Section 5K2.10 necessarily assumes that a defendant's conduct was unreasonable; otherwise one would be hard pressed to say that the defendant had committed any

criminal offense at all, even in the paradigmatic case of an assault. The policy statement deals not with a situation in which provocation is proffered as a complete or even partial defense, but rather with one in which the provocation does not rise to the level sufficient to constitute a defense at all.

Even when it suffices to exculpate the defendant or lower the degree of the offense, victim misconduct or provocation need not provoke a reasonable response in the accused. Thus, although courts historically have considered killing upon a sudden quarrel (or in the heat of passion) to be manslaughter, it is obvious that such a killing is considered unreasonable in that we expect a reasonable person to withstand the provocation, on pain of criminal prosecution and punishment. "What is really meant by 'reasonable provocation' is provocation which causes a reasonable man to lose his normal self control, and although a reasonable man who has thus lost control over himself would not kill, yet his homicidal reaction to the provocation is at least understandable [and his degree of guilt is mitigated from murder to voluntary manslaughter]." W. LaFave & A. Scott, Jr., *Criminal Law* § 7.10(b) at 654 (2d ed. 1986) Similarly,

> Provocation is said to be adequate "if it would cause a reasonable person to lose his self-control." But if a reasonable person would have committed the same offense, then arguably the defendant should merit complete exculpation for he acted no differently than the reasonable man. The actual standard probably is something less than this, just as the result of the defense is liability somewhat less than that normally imposed for an intentional killing. . . [¶] Adequate provocation commonly includes: [¶] (A) physical, unjustified attack, [¶] (B) mutual combat, [¶] (C) some instances of a threat of physical attack, . . .

P. Robinson, *Criminal Law Defenses* § 102(b)(2) (1984) (footnotes omitted). Clearly the district court was entitled to find that circumstances of this type existed in this case, even if the "reasonable police officer" might have reacted differently.

Although assault statutes typically do not make the many distinctions that are common in homicide statutes, provocation remains a relevant factor, especially at sentencing.

> Some statutes, while not providing a defense to assault and battery, sometimes specifically recognize some provocations, such as insulting and abusive words, as evidence mitigating punishment. Even absent statutory authority, courts sometimes impose a reduced sentence where an assault is committed under extreme provocation.

Robinson, *Id.* § 106 (h).

Here, § 5K2.10 provides ample authority for a downward departure. It is important to remember that in this case provocation is being considered as a sentencing factor, rather than even a partial defense. The relevant policy statement is broadly written, imposing no requirement that the response to a provocation be reasonable or that the provocation

itself be extreme. These are simply factors to be considered in determining the extent of departure. Police officers who overreact are neither as culpable nor as dangerous as those who might perpetrate premeditated acts of violence against innocent persons. The distinction made by the district court is eminently sensible and justified under the Guidelines and policy statements.

There is no basis for the Ninth Circuit's conclusion that a sentence reduction under § 5K2.10 for victim misconduct is inconsistent with the policy underlying the four-level enhancement for official misconduct in the civil rights cases Guidelines. This four-level increase reflects a conclusion that official misconduct is more culpable than similar misconduct committed by an ordinary citizen. But this conclusion does not preclude distinguishing among differing degrees of culpability. This is exactly what the trial court did in the case at bar, and properly so.

II. THE RISK OF ABUSE AND THE "ADDITIONAL PUNISHMENTS" INFLICTED ON PETITIONERS BECAUSE OF THEIR BEING POLICE OFFICERS.

Police officers are human beings. Although we might wish otherwise, they are subject to all human frailties. To ignore this fact and to impose punishment without regard for the particular circumstances involved will encourage conduct like that of the victim in this case. It will also serve to deter police officers from arresting violent and combative suspects, for fear that they, too, may be later judged to have overstepped

blurry bounds in a fluid and volatile situation, even as they thought they were doing right, only to wind up serving years in federal prison. R. Paz, *Civil Rights Laws: The Need for a New Look at an Old Bandaid* [*sic*], 14 Chicano-Latino L. Rev. 20, 21 (1994).

The federal courts of this country have traditionally been a place of vindication for the rights of the politically unpopular individual. In 1967, in another time of popular dissatisfaction with governmental policy being directed at individual representatives of the lawful authority of government, be they individual police officers or soldiers, this Court took the significant step of announcing what might seem a self-evident truth: "[T]hat policemen, like teachers and lawyers, are not relegated to a watered-down version of . . . rights." *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967).

In the case at bar, the trial court honored this basic tenet of fairness and equity in the most extreme and difficult of events: the sentencing of police officers for criminal offenses committed in the course of their duties.

It must be emphasized at the outset that neither petitioner received anything like a slap on the wrist. Both men were sentenced to 30 months in federal prison, to be followed by two years of supervised probation. *Sentencing Memorandum* at 135a. Neither man will ever work again in his chosen profession. Both have been held up as an example and object of ridicule throughout the world. Any hope of quiet and private existence has been dashed. Neither will ever enjoy the emoluments of being a citizen, including the rights to vote, serve on a jury, or seek office. Both are quite likely to be

targets of attack for the rest of their lives, even after having completed their sentences. By and large, none of these collateral consequences of their convictions would occur but for the fact that these two men were police officers at the time of the offense.

In ordering a three-level departure downward (apart from the departure based on victim misconduct and provocation discussed above), the trial court correctly and accurately weighed the particulars of the cases of the two individual citizens before it and placed appropriately heavy emphasis on the extraordinary impact of a criminal conviction upon these two men, as well as on these men's extreme vulnerability to abuse in prison. None of these factors is prohibited from consideration by the Guidelines, yet still none independently was held by the district court to warrant a departure. Directly addressing this situation, the Commission has recognized

> [T]he possibility of an extraordinary case that, because of a combination of such characteristics or circumstances, differs significantly from the 'heartland' cases covered by the guidelines in a way that is important to the statutory purposes of sentencing, even though none of the characteristics or circumstances individually distinguishes the case.

Section 5K2.0, commentary.

There is simply no avoiding the fact that this case became a focal point for an unprecedented amount of anger and

emotion throughout this nation and much of the world. *See* Government's closing argument to the jury, reproduced in *Petition for Writ of Certiorari*, in *Powell v. United States*, Supreme Court Case No. 94-8842 at 11. The two petitioners can be said, quite without exaggeration, to have been two of the most unpopular men in the nation at the time of their trial(s). Any citizen in their position would reasonably fear exposure to attack and retribution once incarcerated. Beyond this subjective, if well-founded, fear, however, also existed more objective and equally well-founded indicia of the petitioners' extreme and unusual vulnerability to abuse in prison.

Significantly, the United States Department of Justice itself, through its Bureau of Prisons (hereinafter the "Bureau"), has explicitly recognized the unusual vulnerability and potential targeting for abuse of police officers who are incarcerated. According to the Bureau, among those persons "who require special management attention" during the classification and monitoring of prisoners in custody are "inmate[s] with a background in law enforcement . . ." U.S. Bureau of Prisons Regulations, 28 C.F.R. § 524.72(h) (1995). Similarly, in delineating which persons prison staff may appropriately consider at risk of harm and in need of affirmative protection from the general prison population, the Bureau specifically includes the following:

> (1) Victims of inmate assaults;
> (2) Inmate informants;
> (3) Inmates who have received inmate pressure to participate in sexual activity;
> (4) Inmates who seek protection through detention, claiming to be former law enforcement officers,

informants, or others in sensitive law enforcement positions, *whether or not there is official information to verify the claim*;
(5) Inmates who have previously served as inmate gun guards, dog caretakers, or in similar positions in state or local correctional facilities; . . .
(8) Inmates about whom staff has good reason to believe the inmate is in serious danger of bodily harm.

U.S. Bureau of Prisons Regulations, 28 C.F.R. § 541.23(a) (1995) (emphasis added). As can be seen, the mere claim of being a former law enforcement officer, without any verification whatsoever, is sufficient to warrant protective custody, isolated from the general prison population. This unique treatment of these certain prisoners reflects the very real danger of physical harm to persons in prison who are even *perceived* to be police officers, let alone persons like petitioners, who were known nation-wide as police officers in a case ripe with notoriety.

Commentators, too, have noted the significantly increased risk of abuse faced by law enforcement officers in custody. Paz, *supra*, at 21; L. Crocker, *Hate Crime Statutes: Just? Constitutional? Wise?*, 1992/1993 Ann. Surv. Am. L. 485, 502 (1993)("Among the most victimized members of prison inmate populations are former police officers and child molesters."). Clearly the trial court was well within its discretion to conclude that the petitioners possessed an "extreme vulnerability to abuse in prison." *Sentencing Memorandum* at 125a. Even under a *de novo* review, common sense as well as the weight of authority convinces us that the

risk of abuse is quite real and dangerous, and, as such, an appropriate and compelling factor in sentencing.

CONCLUSION

For the foregoing reasons, *amicus curiae* the National Association of Police Organizations respectfully requests that the Court grant petitioner Koon and petitioner Powell's applications and reverse the judgement in this case of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted this 9th day of November, 1995,

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No. 94-1664

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

STACEY C. KOON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Justice For All: Understanding and Controlling Police Abuse of Force, at 233, 241 (William A. Geller and Hans Toch, eds., 1995) 8

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

No. 94-1664

STACEY C. KOON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF THE LAW ENFORCEMENT LEGAL DEFENSE FUND AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*

The Law Enforcement Legal Defense Fund ("LELDF") is a national non-profit public interest law and policy center organized to support law enforcement officials through financial assistance and by promoting public awareness of the role of police and respect for the law enforcement community.

SUMMARY OF ARGUMENT

This case involves the appropriate punishment for police officers whose legal and sanctioned use of force has crossed the thin line into use of force that is considered illegal. In excessive force cases, especially those involving criminal liability, the consequences for individual police officers are severe. Officers convicted of excessive force in criminal proceedings face heavy penalties, including possible prison sentences, in addition to the loss of their position and potential future employment. In such cases, district courts must be allowed to exercise their discretion to provide "a sentence sufficient, but not greater than necessary, to comply with the purposes" of sentencing. 28 U.S.C. § 3553(a).

While criminal sanctions may be appropriate for corrupt police officers or those law enforcement agents who engage in random acts of violence, criminal sanctions are too harsh in cases like this one where police officers are attempting to effect a legitimate arrest of a recalcitrant suspect and the force used is later determined to be excessive. Unlike cases of police corruption or premeditated misconduct, which are treated under the same Sentencing Guidelines, Sergeant Koon did not intentionally seek out an innocent citizen to abuse, nor did he commit aggravated assault with premeditation. Police officers who are in tense and potentially violent arrest situations, and whose use of force is later deemed excessive, should be entitled to consideration for discretionary downward departures.

Congress intended the Sentencing Commission to establish Guidelines that "maintai[n] sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices." 28 U.S.C. § 991(b)(1)(B). Congress intended to preserve for

the judge the discretion to depart when cases are unusual. District courts must be allowed to exercise this discretion to determine the appropriate sentence for cases that involve victim misconduct and excessive force.

ARGUMENT

I. Law Enforcement Agents Must Not Be Deterred From Using Force to Protect Themselves and the Public

Police officers face enormous challenges and responsibilities in preventing crime, keeping the peace and apprehending criminals. As reported by the United States Civil Rights Commission in its review of police use of force:

> Police officers possess awesome powers. They perform their duties under hazardous conditions and with the vigilant public eye upon them. Police officers are permitted only a margin of error in judgment under conditions that impose high degrees of physical and mental stress. Their general responsibility to preserve peace and enforce the law carries with it the power to arrest and to use force -- even deadly force.[1]

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[1] United States Civil Rights Com'n, Who is Guarding the Guardians at v (1981), cited in Geoffrey P. Alpert and William C. Smith, *Criminology: How Reasonable is the Reasonable Man?: Police and Excessive Force*, 85 J. Crim. L. 481 (Fall, 1994).

The standards for excessive force cases must take into account the challenges and pressures that police officers face.

Every contact an officer makes with a suspect is fraught with danger. Even in routine traffic stops, police officers are presented with a vast array of unknown factors: is the driver armed, on drugs, violent? In 1992 alone, over 80,000 law enforcement officers were assaulted; 7,251 of these assaults occurred while a police officer was making a traffic pursuit or stop.[2]

When a suspect resists arrest, attempts to escape, appears to be on drugs, or otherwise seems to pose a danger to the officers or innocent bystanders, police officers must do what is necessary to apprehend the suspect, which may very well involve the use of force. This force may later be deemed criminally excessive or, at the very least, expose the police officer to civil liability. If a law enforcement agent's conduct is deemed to have constituted illegal force, the consequences are high -- the police officer can face prison, loss of position, and financial penalties.

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2 *Bureau of Justice Statistics Sourcebook of Criminal Justice Statistics* 1993 ("Sourcebook") at 406 (Table 3.161), citing U.S. Department of Justice, Federal Bureau of Investigation, *Law Enforcement Officials Killed and Assaulted, 1992*, p. 65, FBI Uniform Crime Reports (Washington, DC: USGPO). In the years 1978 to 1992, almost 1,200 police officers were killed on the job. Of those, 165 were killed during traffic pursuits or traffic stops. *See* Sourcebook at 401 (Table 3.154).

If a police officer is not forceful enough, however, he or she may face equally severe consequences -- failing to use adequate force risks injury, not only to the police officer, but also to partners or innocent bystanders. If officers are overly concerned with the possible sanctions for excessive force, they may not be able to provide adequate protection for citizens.

There is evidence that fear of civil liability is causing police officers to have second thoughts about any confrontations. Riverside police union President Jack Palm recently sent a memorandum to union members urging them to consider the potential economic effect before initiating any police action.[3] Palm noted that "[t]here's a saying among police officers, 'if you haven't been to federal court at least once, you will soon.'" Responding to this concern, Congressman Carlos Moorhead (R-Calif.) sponsored a bill to make it tougher for juries to levy punitive damages against police officers in civil suits. In promoting the legislation, he declared: "It is not in the interest of society if police officers get timid . . . . These are people with very dangerous jobs out there fighting for us in the streets . . . . These lawsuits are bound to deter the aggressiveness in which they carry out their jobs." *Id.*

If fear of civil liability is deterring police officers' necessary use of force, the threat of criminal liability and the dramatic consequences arising therefrom provide an even stronger disincentive to using force when it is necessary. To prevent perverse incentives, district courts should -- and under the clear words of the Sentencing

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3 Marc Lacey, *Moorhead Seeks Limit in Suits Against Police*, Los Angeles Times, August 15, 1995, at A1.

Guidelines do -- have discretion in excessive force cases to take into account the nature of police work in determining whether the case warrants a departure from the sentence that would otherwise be imposed.

II. Unless District Courts are Allowed Discretion, Sentences of Police Officers in Excessive Force Cases Will be too Severe

Police officers routinely must use force to apprehend suspects and control prisoners. In a recent survey of over 1000 law enforcement agencies, the 198 city police departments providing responses reported 4,425 incidents of bodily force during 1991.[4] City police departments also reported 36.2 incidents of use of batons per 1000 officers, 490.4 incidents of handcuffs/leg restraints per 1000 officers, and 126.7 incidents of swarming a suspect per 1000 officers during 1991.[5]

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4 Antony M. Pate and Lorie A. Fridell, *Police Use of Force: Official Reports, Citizen Complaints and Legal Consequences* (1993), Appendix at B-3.1. This survey was conducted by the Police Foundation, a nonprofit research group, with the support of the National Institute of Justice. To standardize the absolute number of reported incidents of the use of force, the study created an indicator representing the number of incidents reported for every 1000 sworn personnel. For city police departments there were 272.2 incidents of bodily force per 1000 officers in 1991. *Id.* at 74 (Table 6.1).

5 *Id.* at 74 (Table 6.1). Swarming is a technique in which several officers surround, immobilize, and handcuff a suspect. *Id.* at 63.

The legitimate use of force necessarily carries with it the possibility that officers may use excessive force. In 1991, 568 city police departments reported over 13,800 citizen complaints of excessive force, which represents 47.5 complaints per 1000 sworn officers.[6] The 219 city police departments that kept records of civil suits reported almost 1900 such suits, which represents 23.7 civil suits based on excessive force per 1000 sworn officers.[7]

Society expects and requires law enforcement agents to use force to deal with criminals. The sanctions for police officers who use excessive force, therefore, must be strict enough to deter behavior that is considered beyond what is reasonable in the situation, but not so severe as to deter the use of force when it is necessary to ensure the safety of both law enforcement agents and the public. Criminal sanctions are not necessarily appropriate:

> In some cases, the criminal law might appear to be too harsh an instrument to use against a police officer even if he did, in fact, use excessive force. In this regard it is useful to note that a high percentage of excessive force claims arise in the context of an arrest, sometimes after a harrowing car chase or in the midst of impending violence or unstable surrounding circumstances. Although it might be appealing simply to say, `let a jury decide,' the very use of the criminal law carries a

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6 *Id.* Appendix at Table B-11.1, 107 (Table 10.1.).

7 *Id.* Appendix at Table B-37, B-38.1.

reputational, psychological, and possibly a monetary penalty to the defendant.[8]

As a general rule, our society should rely upon administrative sanctions and civil remedies for police officers whose use of force to make a lawful arrest is determined to be excessive. Criminal sanctions should be reserved primarily for situations where police officers engage in the unlawful use of force for corrupt purposes or without provocation. However, to the extent criminal sanctions are imposed on police officers whose use of excessive force occurs in the context of a legitimate law enforcement activity, then the district court should be allowed the discretion intended by Congress and the Sentencing Guidelines to impose a sentence that is appropriate to the circumstances.

A. Application of the Sentencing Guidelines in Excessive Force Cases

Under the Sentencing Guidelines, police officers charged with excessive force face criminal liability based on violation of 18 U.S.C. § 242, the crime of interference with civil rights under color of law.[9] *See United States v Masserlian*, 832 F.2d 778 (3d Cir. 1987) (convicting state

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[8] Mary Cheh, Are Law Suits an Answer to Police Brutality, in *And Justice For All: Understanding and Controlling Police Abuse of Force*, at 233, 241 (William A. Geller and Hans Toch, eds., 1995).

[9] This crime involves a maximum term of ten years if bodily injury results. *See* § 2H1.4. Police officers can also be found criminally liable under 18 U.S.C. § 241 for conspiracy to interfere with civil rights.

trooper under 18 U.S.C. § 242 in excessive force case), *cert. denied*, 485 U.S. 988 (1988). Proof of the crime of deprivation of civil rights under § 242 requires proof that the defendant had the specific intent to deprive the victim of a right under the Constitution. *United States v. Epley*, 52 F.3d 571 (6th Cir. 1995).

Under the Sentencing Guidelines, the base offense level for violations of § 242 is the greater of 10 or 6 plus the offense level applicable to any underlying offense. § 2H1.4. Therefore, police officers sentenced under this provision, regardless of the circumstances of their conduct, are treated more harshly than a criminal defendant who commits the same underlying offense. In Mr. Koon's case, for example, the district court reached a final offense level of 27 based principally on its determination that the underlying offense was aggravated assault.

Aggravated assault is defined as a "felonious assault that involved (a) a dangerous weapon with intent to do bodily harm (*i.e.* not merely to frighten), or (b) serious bodily injury, or (c) an intent to commit another felony." *See* § 2A2.2, Commentary, Application Note 1. The district court found that Mr. Koon was guilty of aggravated assault based on Officer Powell's conduct.

Aggravated assault carries a base offense level of 15. In Mr. Koon's case, the court increased the base offense level due to certain specific offense characteristics. Specifically, the court determined that: 1) because a dangerous weapon was "otherwise used," the base offense level was increased by 4; and 2) because the victim sustained bodily injury, the base offense level was increased by 2. The final base offense level for aggravated assault

was thus 21, which when added to 6, as required by § 2H1.4(a)(2) resulted in a final base offense level of 27.[10]

Despite the fact that Officer Koon was acquitted of assault charges in the state trial, the district court sentenced him on the basis of the underlying conduct of aggravated assault in addition to the base offense level for the crime for which he was actually convicted, interference with civil rights under color of law. Moreover, the district court added to the base offense level for Mr. Powell's use of a "dangerous weapon."[11]

The sentence for this conduct was too severe given the circumstances. The district court recognized that this case fell outside the "heartland" of cases involving interference

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10 Under the Sentencing Guidelines, an offense level of 27 combined with a Criminal History category of I results in a sentence range of 70-87 months. By comparison, the median sentence of incarceration imposed by State courts for aggravated assault in 1990 was 24 months. *Sourcebook* at 529 (Table 5.53).

11 Police officers are required to carry "dangerous weapons" and often must use them. It is unfair to train law enforcement agents to use batons or firearms, require officers to carry these "dangerous weapons," and then penalize the officers for using them in a situation where their use begins as legitimate force, but at some point during the encounter is deemed excessive. Unlike defendants who have no legitimate reason for carrying a dangerous weapon, police officers should not be subject to greater penalties for making a good-faith effort to comply with the demands of their job. In all of Sergeant Koon's testimony, he stated that he believed he used the proper, authorized techniques to bring a resisting suspect into compliance.

with civil rights and departed accordingly. The district court's decision to downwardly depart should be affirmed.

B. Inadequacy of the Guidelines Without Discretionary Downward Departures

The Sentencing Guidelines do not differentiate between the case of excessive force that begins as lawful conduct but is later determined to have constituted, at least in part, illegal force and cases where the use of force was unlawful *ab initio*.

For example, the same Sentencing Guidelines apply to Sergeant Koon's conviction of violation of civil rights for the nineteen seconds he did not control the illegal conduct of Officers Powell and Wind as apply to a police guard who intentionally seeks out a prisoner to assault with a dangerous weapon or a police officer who stops a car with the intent to harass and beat the driver. *See United States v. Simon*, 964 F.2d 1082 (11th Cir. 1992) (affirming conviction under 18 U.S.C. § 241 for conspiracy to violate constitutional rights, where police officers planned to rob a drug dealer, found no drugs or money, and killed drug dealer and his companion), *cert. denied*, 113 S. Ct. 1854 (1993). The culpability, however, is vastly different. Police officers who are involved in premeditated and corrupt behavior, such as planning and committing a robbery or murder of a drug dealer, should be severely sanctioned. Where police officers use force in a legitimate setting, however, the district court has discretion to depart from the Guidelines range and appellate courts should defer to the district court's "superior `feel' for the case." *United States v. Rivera*, 994 F.2d 942, 950-51 (1st Cir. 1993).

Here, Sergeant Koon was found criminally liable of aggravated assault for about nineteen seconds of "illegal behavior" by Officers Powell and Wind following over one

minute of legal force used to restrain a suspect who resisted arrest and who Sergeant Koon reasonably could have believed was "under the influence of PCP because of [his] erratic and recalcitrant behavior." Pet. App. at 101a. Sergeant Koon's liability stems from his failure to prevent unlawful application of force against Mr. King by other police officers. He did not use or threaten force himself.

The district court's determination of when Mr. Koon's behavior turned from legal force in effecting a legal arrest to illegal deprivation of civil rights involved an extremely detailed description of events that occurred over less than a minute and a half. In the end, the district court determined that there was very little "illegal behavior" during the arrest situation: "Messrs. Koon and Powell were convicted of conduct which began as a legal use of force against a resistant suspect and subsequently crossed the line to unlawfulness, all in a matter of seconds, during the course of a dynamic arrest situation." Pet. App. at 123a.

For example, the Sentencing Guideline used for the underlying offense conduct for which Sergeant Koon was sentenced, aggravated assault, is the same guideline that would apply to a prisoner who attacks another inmate with a table leg. *See United States v. Hernandez-Fundora*, 58 F.3d 802 (2nd Cir. 1995) (affirming conviction of aggravated assault and sentence based on § 2A2.2). The culpability of a police officer who is trying to do his job and goes too far is much less than that of a criminal defendant who premeditates and intends to commit a crime. Police officers who use force to apprehend recalcitrant suspects should not be treated the same as prison inmates who randomly attack other inmates. In this case, because the police officers' initial contact with Rodney King was legal and because the officers did not commit any crime

with premeditation, it is appropriate to allow district courts to consider a discretionary downward departure.

The Sentencing Guidelines are designed to allow district judges to recognize differences in culpability and moderate sentences accordingly. Police officers who, like Sergeant Koon, are convicted of violations of civil rights for conduct which began as lawful and authorized, should be entitled to consideration for discretionary downward departures. Otherwise, an unintended unfairness will result as these police officers will be treated the same as defendants whose culpability is significantly greater.

III. The District Court Relied Upon Appropriate Factors For Discretionary Downward Departures Under the Sentencing Guidelines

The District Court based its departures, in part, on victim misconduct and on the additional punishment faced by Sergeant Koon as a result of the trial and sentence. Based on the nature of excessive force cases and the need to provide proper incentives to police officers, appellate courts should respect decisions to downwardly depart in all cases where a police officer begins by using legitimate force to effect a legal arrest but, at some point in time, the conduct is deemed to have been excessively forceful.

A. Victim Misconduct

The Sentencing Guidelines specifically and expressly authorize downward departures based on victim misconduct. "If the victim's wrongful conduct contributed significantly to provoking the offense behavior, the court may reduce the sentence below the guideline range to reflect the nature and circumstances of the offense." § 5K2.10 (Policy Statement). The Guideline does not require that the provocation be immediately followed by a

response. The opposite is true. The Guideline provides that a continued course of provocation can eventually lead to a response that may be the basis for a downward departure. A departure may be warranted, even in a case involving a non-violent offense, following "an extended course of provocation and harassment." § 5K2.10 (Policy Statement). Courts are specifically instructed to consider: "any other relevant conduct by the victim that substantially contributed to the danger presented." § 5K2.10(e) (Policy Statement).

If a non-police defendant can receive a downward departure when provoked, a police officer whose conduct begins as legal and reasonable force, but crosses the line to illegal conduct because of provocation by the suspect, should also receive such a departure. Indeed, police officers are more deserving of consideration for departures in these situations.

Volatile and potentially violent situations are part of a police officer's job. When law enforcement agents use force in effecting a legal arrest, they do so not because they have picked a fight or because they are attempting robbery or manslaughter, but because they must use force to do their job. It is unfair to require police officers to use force and then refuse to allow district courts discretion to give more lenient sentences to those officers as compared to defendants who commit assault with premeditation.

This is not a situation where a police officer assaults an innocent bystander for no reason, nor is it a situation in which a corrupt police officer shakes down a drug dealer for drugs to sell the drugs for his own profit. It is therefore proper for the district court to make a downward departure.

The Ninth Circuit majority opinion in a strained interpretation of the district court's fact-finding for

sentencing purposes, restated the district court's fact-finding by concluding that the court did not find officers Koon and Powell were provoked in "precisely the manner contemplated by § SK2.10." Pet. App. at 70a. Victim misconduct is built into the *Graham* test for evaluation of excessive force claims under the Fourth Amendment. *See* Pet. App. at 73a. In *Graham v. Connor*, the Supreme Court recognized that

> [t]he calculus of reasonableness must embody allowances for the fact that police officers are often forced to make split-second judgments -- in circumstances that are tense, uncertain and rapidly evolving -- about the amount of force that is necessary in a particular situation.

490 U.S. at 396-97, 109 S. Ct. at 1872. While the dynamic arrest situation may already be considered in determining liability under *Graham*, that does not mean a district court cannot rely on the nature and quality of police use of force to downwardly depart in sentencing. Simply because a factor is considered in determining liability does not forbid the use of that factor in sentencing. For example, self-defense or battered-woman syndrome may be rejected as a complete defense to liability for murder, but evidence of victim misconduct can still be considered at sentencing. *See United States v. Whitetail*, 956 F.2d 857, 863-64 (8th Cir. 1992) ("the fact that the jury rejected Whitetail's claim that she acted in self-defense did not remove from the District Court its discretion to consider at sentencing her battered-woman evidence as a basis for departure [under § 5K2.10] from the guidelines").

Victim misconduct is expressly encouraged as a factor to consider. The district court's discretionary downward departure based on victim misconduct should be affirmed.

B. Additional Punishment Inherent in the Sentence

The district court based its departure, in part,[12] on two categories of additional punishment: "(1) the defendant's extreme vulnerability to prison abuse; and (2) the defendant's exposure to additional adversarial proceedings as a result of his conviction." Pet. App. at 124a. This departure is consistent with the Sentencing Guidelines and should be affirmed.

The district court's departure based on vulnerability to prison abuse is due to the defendant's status as a police officer: "[T]he widespread publicity and emotional outrage which have surrounded this case from the outset, in addition to the defendants' status as police officers, lead the Court to find that Koon and Powell are particularly likely to be targets of abuse during their incarceration." Pet. App. at 125a. If the vulnerability to abuse were related to the nature of the offense, such as might be the case for a child molester, it would not be reasonable to allow a downward departure. Those who commit especially heinous crimes should not get lighter sentences simply because they are especially hated.

But the vulnerability a police officer faces is different. Prisons are full of people who have been arrested by police officers. The district court's determination that police officers face a higher chance of abuse in prison is reasonable.

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12 The district court relied on a combination of factors, including the fact that Sergeant Koon posed no criminal threat in the future and the "spectre of unfairness" created by successive state and federal prosecutions as well as the additional punishment inherent in the sentence.

A police officer should be treated the same as any other defendant whose physical characteristics make them more susceptible to abuse. The police officer's status as a law enforcement agent, just like the status of someone who is physically small or immature, makes them more vulnerable to abuse. *See United States v. Gonzalez*, 945 F.2d 525 (2d Cir. 1991) (affirming departure for a defendant who was small, feminine-looking, and had the appearance of a fourteen year old); *United States v. Lara*, 905 F.2d 599 (2d Cir. 1990) (affirming departure for a defendant who was small, appeared immature, and was bisexual, leading prison officials to place him in solitary confinement for his own protection). Every police officer should be eligible for consideration for a downward departure, just like every defendant whose physical status makes him more vulnerable to abuse is eligible. In neither case is it a "reward" for having the status of a small, immature person or the status of a law enforcement agent. Rather, eligibility for consideration of a downward departure is just a reflection of the fact that the punishment is more severe for those whose status makes them more likely to suffer abuse in prison.

The court also relied on the additional adversarial proceedings that Sergeant Koon would face as a result of his conviction. The professional consequences to Sergeant Koon are severe, as noted by the District Court: 1) "the LAPD Board of Rights will charge Koon and Powell with a felony conviction and, in a quasi-judicial proceeding, will strip them of their position and tenure" and (2) "Koon and Powell will be disqualified from other law enforcement careers." Pet. App. at 127a (footnotes omitted).

The Ninth Circuit majority contends that additional adversarial proceedings are not a permissible basis for departure because they are "not a circumstance that spoke

to the offense in question or to the offender's character." Pet. App. at 61a. The Ninth Circuit "refuses to permit departures based on factors that do not speak to the offender's character, the nature or seriousness of the offense, or some other legitimate sentencing concern." Nothing in the Sentencing Guidelines, however, limits departures this way.

Even if it were true that district courts can only depart if factors "speak to the nature and seriousness of the defendant's crime or to his culpability," personal and profession consequences that stem from a criminal conviction are tied to a penological purpose or legitimate sentencing concern. If part of the purpose of sentencing is just punishment or deterrence, those defendants who face additional adversarial proceedings as a result of their conduct will necessarily receive greater punishment and deterrence as a consequence. Recognizing the impact of such proceedings is a realistic and appropriate consideration in determining what sentence should be imposed by the court.

The district court's discretionary downward departure based, in part, on the additional punishment Sergeant Koon will face should therefore be affirmed.

IV. The LELDF Endorses the Standard Proposed by Petitioner

The Petitioner's Brief proposes that sentencing departures should be reviewed by appellate courts only for abuse of discretion. The district court is the finder of facts and must apply the facts to the Guidelines. Appellate courts should recognize the district court's superior feel for the case, and give deference to the district court's departure decisions.

Under this standard, which the LELDF endorses, the sentence imposed by the District Court should be affirmed.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Ninth Circuit should be reversed and the sentence imposed by the District Court should be reinstated.

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IN THE
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UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

Amicus Curiae the National Association of Criminal Defense Lawyers ("NACDL") submits this brief in support of petitioner Stacey C. Koon's appeal seeking reversal of the decision of the Court of Appeals for the Ninth Circuit reversing the sentence imposed by the district court and seeking reinstatement of that sentence. This brief primarily addresses the standard of appellate review of a district court's decision to depart from the United States Sentencing Guidelines (the "Guidelines") in the "unusual" or "atypical" case. While the NACDL does not condone the activities for which petitioner Stacey C. Koon was charged and convicted, it believes that he, like any other citizen, is entitled to elemental fairness in the application of the law.

The NACDL is a national organization of over 8,000 criminal defense attorneys who practice in the federal and state courts. Its members come from every state in the United States, as well as from Puerto Rico, the Virgin Islands, Guam and several foreign countries. The NACDL is affiliated with 68 state and local criminal defense organizations with which it works cooperatively on issues related to the area of criminal defense and thus, it speaks for more than 28,000 criminal defense lawyers nationwide. The NACDL is a non-profit association which was formed in 1958 exclusively for charitable, scientific, educational and legislative purposes. Among other things, the NACDL seeks to promote the study of and research in the field of criminal defense law and procedure and constitutional law, to advance the knowledge of the law as it relates to the practice of criminal defense, to promote the proper and fair administration of criminal justice, to preserve, protect and defend the adversary system of justice and the Constitution,

to maintain and foster an independent and able criminal defense bar, and to ensure justice and due process for persons accused of committing crimes. Among its various activities, the NACDL files *amicus curiae* briefs in courts nationwide in cases of importance to the fair and evenhanded administration of justice.

The primary interest of the NACDL as *amicus curiae* in this case is the issue of the appropriate standard of appellate review of a sentencing court's decision to depart from the Guidelines on the ground that unusual circumstances exist such that the particular case falls outside the "heartland" of typical cases embodying the conduct that each guideline describes. The NACDL urges the Court to establish a uniform standard of limited appellate review that will give substantial deference to a sentencing court's decision that circumstances exist that are of a "kind" or "degree" that warrant a departure from the Guidelines offense level otherwise applicable. *See* 18 U.S.C. § 3553(b). The NACDL further urges the Court to hold squarely that the sentencing court may base a departure on a determination that the totality of the circumstances makes the case "atypical" even if none of the considered factors alone would make the case so "unusual" that a departure would be justified. *See* U.S.S.G. § 5K2.0, comment. (combination of factors may take the case out of the heartland even if none individually would distinguish the case).

The written consent of both parties to this case, petitioner Koon and respondent United States, has been obtained for the filing of this petition.[1]

A LIMITED STANDARD OF APPELLATE REVIEW SHOULD BE APPLIED TO A DISTRICT COURT'S DEPARTURE BASED UPON A FINDING OF AN ATYPICAL CASE

The Ninth Circuit's decision to vacate the district court's downward departures in this case is based upon an impermissibly restrictive view of a sentencing court's authority to depart from the Guidelines. While the NACDL realizes that under the Guidelines the district court should not have unfettered discretion in applying the Guidelines with respect to departures, it does believe that district courts should retain, at a minimum, the degree of flexibility suggested by *United States v. Rivera*, 994 F.2d 942 (1st Cir. 1993) (Breyer, J.). Thus, the NACDL urges a standard of limited appellate review that will pay substantial deference to a sentencing court's determination of "'unusualness' with 'full awareness of, and respect for, the trier's superior "feel"' for the case." *United States v. Rivera*, 994 F.2d at 952 (quoting *United States v. Diaz-Villafane*, 874 F.2d 43, 50 (1st Cir.), *cert. denied*, 493 U.S. 862, 110 S. Ct. 177 (1989)); *see also United States v. Broderson*, 1995 WL 574770, at *6 (2d Cir. Sept. 29, 1995) (adopting the *Rivera* analysis). *But see United States*

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[1] Accompanying this brief are Letters from Drew S. Days, III, Solicitor General, on behalf of the government, and Theodore B. Olson of Gibson, Dunn & Crutcher, on behalf of petitioner Koon, consenting to the filing of a brief *amicus curiae* by the NACDL.

v. Goff, 20 F.3d 918, 920 n.1 (8th Cir. 1994) (Eighth Circuit has not adopted *Rivera* standard that gives "greater deference 'to sentencing court determination of whether (and the extent to which) given circumstances make a case "unusual" or "not ordinary."'")

The district court's familiarity with and "superior feel" for the particular case before it calls for the adoption of a narrow scope of appellate review of a sentencing court's departure decision. This same rationale underlies the widely-accepted standard of limited review of a district court's evidentiary decisions and a magistrate's probable cause determinations with respect to a warrant application. Just as a district court's decisions involving evidentiary matters are given "substantial deference" by an appellate court because it, as opposed to the appellate court, has a better "feel" for the case from having participated in the proceedings that moved step-by-step toward the decision that prompted the challenge on appeal, so too does a district court have a "superior feel" for an "unusual" or "atypical" case with respect to sentencing. *See, e.g., Bradley v. Secretary of Dept. of Health & Human Services*, 991 F.2d 1570 (Fed. Cir. 1993) (fact-finder has broad discretion in evidentiary determinations); *May v. Arkansas Forestry Com'n*, 993 F.2d 632, 637 (8th Cir. 1993) (appellate court must give "substantial deference" to district court's evidentiary rulings); *Gracia v. Lee*, 976 F.2d 1344, 1345 (10th Cir. 1992) (district court accorded "considerable deference" in evidentiary matters); *Adams v. Sewell*, 946 F.2d 757, 768 (11th Cir. 1991) (district court accorded "great discretion" in evidentiary rulings); *Rent-A-Center, Inc. v. Canyon Television & Appliance Rental, Inc.*, 944 F.2d 597, 601 (9th Cir. 1991) ("broad discretion" accorded district court's evidentiary determinations).

Certainly, an appellate court should accord a sentencing court at least as great deference regarding its determination of whether to depart from the Guidelines -- a generally non-constitutional decision -- as a reviewing court gives to a magistrate judge's determination of a constitutional issue concerning the basis for the issuance of a search warrant. *United States v. Leon*, 468 U.S. 897, 913, 104 S. Ct. 3405, 3416 (1984) (recognizing that a magistrate's determination of probable cause should be paid "great deference" by reviewing courts); *Illinois v. Gates*, 462 U.S. 213, 236, 103 S. Ct. 2317, 2331 (1983) ("magistrate's 'determination of probable cause should be paid great deference by reviewing courts'"); *Spinelli v. United States*, 393 U.S. 410, 419, 89 S. Ct. 584, 590-91 (1969) ("in judging probable cause issuing magistrates are not to be confined by niggardly limitations or by restrictions on the use of their common sense . . . [and] their determination of probable cause should be paid great deference by reviewing courts" (citations omitted)). Indeed, a sentencing court's knowledge of and feel for the case before it is far greater than that of a magistrate judge called upon to determine whether probable cause exists sufficient for the issuance of a search warrant. While an issuing magistrate judge typically makes an immediate, hurried determination regarding a citizen's constitutional right to be free from unreasonable searches and seizures by the state based on facts within the four corners of an affidavit before him or her, a sentencing court's determination of an appropriate sentence under the Guidelines in a particular case is, even if the case is settled without a trial, a thoughtful decision based upon personal observations of the defendant and the opportunity to read and consider the written and sometimes oral submissions from defense counsel, the prosecutor, the Probation Department, the victim, and relevant medical or psychiatric experts. Further, probable cause is a largely legal

determination made in a comparative vacuum based upon the facts in the supporting affidavit in issue, and thus is easily subject to reconsideration by a reviewing court with the benefit of input from the parties and an opportunity to research and consider the issues.

As the *Rivera* Court recognized, a sentencing court has greater competence and expertise in determining whether the particular case before it is "unusual" or "atypical" than does an appellate court because the sentencing court is "likely to have seen more *ordinary* Guidelines cases, for appellate courts hear only the comparatively few cases that counsel believe present a colorable appeal." *Rivera*, 994 F.2d at 951. As one reviewer has observed, appellate court judges "no longer look defendants in the eye, study presentence reports, or struggle with assessing whether an offender is beginning or ending a criminal career, appears to be dangerous or harmless, is a minnow in a sea of big fish, or has gone astray under unusually stressful circumstances and will not offend again," and that they "no longer see large numbers of worried or stunned faces, or multiple defendant cases covering the full range of criminal responsibility." Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on The Discretion of Sentencers*, 101 Yale L.J. 1681, 1728 (1992). The deference that should be accorded a sentencing court's decision on departure matters in an unusual case is simply an acknowledgment that district courts generally are in the best position to recognize atypical cases. *See Rivera*, 994 F.2d at 950. Thus, it is the sentencing court's unique position -- its experience and special competence with respect to the particular case -- that permit it to impose a just and equitable sentence, the goal of the Sentencing Commission in formulating the Guidelines. *Rivera*, 994 F.2d at 951-52.

AN APPELLATE COURT REVIEW SHOULD ACCORD SUBSTANTIAL DEFERENCE TO A SENTENCING COURT'S DETERMINATION THAT A CASE IS ATYPICAL BASED UPON EITHER A SINGLE FACTOR OR A COMBINATION OF FACTORS

The NACDL supports a deferential standard of limited appellate review rather than a more rigid standard that would have the effect of placing a "straitjacket" on a sentencing court, "compelling it to impose sentences like a robot inside a Guidelines' glass bubble, preventing it from exercising discretion, flexibility or independent judgment.'" *United States v. Jagmohan*, 909 F.2d 61, 65 (2d Cir. 1991) (quoting *United States v. Lara*, 905 F.2d 599, 604 (2d Cir. 1990)).

In its support of a limited scope of appellate review, the NACDL does not contend that the standard suggested by *Rivera* is necessarily the one that the Court should adopt. It does believe, however, that the limited scope of review suggested by *Rivera* properly recognizes the experience and special competence of sentencing courts to view the particular factors in each case in terms of the gestalt of the entire case. *Rivera*, 994 F.2d at 951-52 (under the *Rivera* analysis, departures may be "encouraged" where the Guidelines specifically list factors to be considered for departure purposes, or "discouraged" where the factors were taken into account by the Sentencing Commission but are present in such an unusual kind or degree as to take the case out of the "heartland," or "forbidden" where the factors in question are prohibited from consideration).

While it may be that a district court has no special expertise in determining whether a factor is "forbidden," "encouraged" or "discouraged" under the Guidelines, it plainly has special expertise when determining whether and

to what extent the given circumstances make the case unusual or atypical. *See Rivera*, 994 F.2d at 951-52. Thus, a district court's determination that the case before it is unusual or not ordinary based upon the existence of a factor or factors of a kind or degree not adequately considered by the Sentencing Commission should be paid great deference by an appellate court. As the court observed in *Rivera*, extending such respect to a sentencing court's departure decision is consistent with the Supreme Court's statement that,

> except to the extent specifically directed by statute, "it is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence."

Williams v. United States, 503 U.S. 193, 112 S. Ct. 1112, 1121 (1992) (quoting *Solem v. Helm*, 463 U.S. 277, 290 n. 16, 103 S. Ct. 3001, 3009 n.16 (1983)). A less restrictive standard of review would result in an appellate court simply substituting its judgment for that of the sentencing court. *Rivera*, 994 F.2d at 952.[2]

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[2] As noted by *Rivera*, extending respect for sentencing court determinations of whether the case is atypical also would be consistent with Congress' instruction that appeals courts "shall affirm" reasonable departures, 18 U.S.C. § 3742(f)(2)-(3), and with "appellate court efforts generally to conduct judicial review in light of comparative institutional competence. *Rivera*, 994 F.2d at 952 (citing "*United States v. Wright*, 873 F.2d 437, 444 (1st Cir. 1989) (deferential review under Guidelines where issue is 'one that is founded "on the application of the fact finding tribunal's experience

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A sentencing court should be bale to rely on a combination of factors, even though none of them standing alone would support a departure when they together create a circumstance that takes the case out of the heartland. *See United States v. Broderson, supra*, at *6 (departure based upon a combination of discouraged factors). Often it is the totality of the circumstances and the interplay between and among the factors that make the case unusual, not the individual factors standings alone. As Circuit Judge Reinhardt observed below: The principle underlying combination departure cases "is rooted in the common sense maxim that the whole is greater than the sum of its parts" and that "it will be how the particular pieces fit together, converge, and influence each other that will lead to the correct decisions." *United States v. Koon*, Nos. 93-50561, 50608, 50562, 50609 (9th Cir. Feb. 2, 1995) (Reinhardt, Circuit Judge, dissenting) (Appendix, at 80a, 84a). *See also* U.S.S.G. Ch. 1, Pt. A intro. comment. (4)(b); 18 U.S.C. § 3553(b).

In reviewing a sentencing court's departure decision in a combination case, an appellate court's inquiry should be limited, first to whether the sentencing court relied upon a forbidden factor as a basis to depart from the otherwise applicable guideline range, and, second, whether the court's departure lacks sufficient grounds so that it constitutes an abuse of discretion. If the departure is not grounded upon an impermissible factor or an abuse of

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> with the mainsprings of human conduct"'") (quoting *United States v. McConney*, 728 F.2d 1195, 1202 (9th Cir.) *cert. denied*, 469 U.S. 825, 105 S. Ct. 101)."

discretion, the appellate court should defer to the district court's view of the unusual nature of the case, even if the factors relied upon are discouraged, rather than encouraged or unconsidered, under the Guidelines. *See United States v. Broderson, supra,* at *6 (appellate court deferred to the district court's determination of unusualness based upon a combination of discouraged factors even though it might not have issued a departure); *see also* U.S.S.G. § 5K2.0, comment. (combination of characteristics or circumstances may take the case out of the "heartland" "even though none of the characteristics or circumstances individually distinguishes the case").

THE SENTENCE IMPOSED BY THE DISTRICT COURT SHOULD BE REINSTATED

In this case, the Ninth Circuit erred in two respects: It failed to apply the appropriate limited scope of review to the district court's sentencing determination and it failed to consider the totality of the circumstances created by a combination of factors that makes the case "unusual" or "not ordinary." While the court did pay lip service to a somewhat deferential standard of review, it essentially substituted its own judgment for that of the district court as to the appropriate sentence for petitioner. Thus, the court failed to give proper deference to the district court's superior "feel" for what it considered an unusual or non-heartland case.

Further, the court erred in its methodology of dissecting each component part of the total circumstances which take the case out of the heartland and assessing whether each factor individually and standing alone would support a departure. The court did not utilize, as it should have utilized, a totality of the circumstances test. *See* U.S.S.G. § 5K2.0, comment. ("The Commission does not foreclose the possibility of an extraordinary case, that because of a

combination of such characteristics or circumstances, differs significantly from the 'heartland' cases covered by the guidelines in a way that is important to the statutory purposes of sentencing, even though none of the characteristics or circumstances individually distinguishes the case."); *United States v. Broderson, supra,* at *6, n.1 (citing U.S.S.G. § 5K2.0, comment.).[3] Cf. *United States v. Leon,* 468 U.S. 897, 104 S. Ct. 3405 (1984) (applying totality of the circumstances test to issuance of search warrant); *Neil v. Biggers,* 409 U.S. 188, 198-99, 93 S. Ct. 375 (1972) (applying totality of circumstances test to in-court identification of defendant). As Circuit Judge Reinhardt observed, the appellate panel "assessed each of the factors independently and concluded that in each instance that it would be inconsistent with the Guidelines to depart downward on the basis of that isolated factor -- notwithstanding the fact that none of them was a prohibited factor" -- which method of review "would essentially eliminate departures based on a combination of factors" because "[n]o combination departure could survive this divide and conquer method of review." *United States v. Koon,* Nos. 93-50561, 93-50608, 93-50562, 93-50609 (9th Cir. Feb. 2, 1995 (Reinhardt, Circuit Judge, dissenting) emphasis in original) (Appendix, at 84a.)

Had the Ninth Circuit applied a standard of review "extend[ing] 'respect' to [the] sentencing court determinations of whether (and the extent to which) given circumstances make [the] case ['unusual' or 'not

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[3] Although U.S.S.G. § 5K2.0, comment, became effective on November 1, 1994 (see appendix C, amendment 508 of the 1994-95 Manual), the amendment, we submit, merely clarified what was, and should have been, the existing law.

ordinary,'" *Rivera*, 994 F.2d at 952, and a totality of the circumstances test, we submit, the court would have affirmed the district court's three-level downward departure based upon a combination of factors. Ultimately, it should be left to the sentencing court, absent an abuse of discretion, to determine "whether the given circumstances, as seen from [its own] unique vantage point, are usual or unusual, ordinary or not ordinary, and to what extent." *Rivera*, 994 F.2d at 951.

THE FACTORS RELIED UPON BY THE DISTRICT COURT JUSTIFIED THE DOWNWARD DEPATURE IN THIS CASE

The NACDL further believes that certain of the factors relied upon by the sentencing court in combination for the three-level downward departure by themselves would justify a downward departure. The district court found that the defendant would suffer "additional punishment" in that he would be subjected to administrative proceedings resulting in the loss of employment and tenure and he would be vulnerable to abuse in prison because of his occupation and the notoriety of the case.[4] (Appendix, at

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[4] The district court properly considered petitioner's vulnerability to additional punishment while incarcerated based upon the unique circumstances of the case. While the Ninth Circuit agreed that vulnerability to abuse may justify a departure in some cases (Appendix, at 64a-65a), it disagreed that this is such a case. In so doing, it merely substituted its judgment for that of the district court. Although the NACDL does not suggest a blanket rule that all police officers sentenced to incarceration in federal prison are vulnerable to abuse or that every case involving a police officer sentenced to prison is "atypical" so that a downward departure should

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58a-66a.) We submit that a sentencing court should be permitted to consider additional punishment, standing alone, when that circumstance is of a kind or degree not adequately considered by the Sentencing Commission when formulating the Guidelines. Loss of employment, tenure and a substantial pension are examples of additional punishment that may provide a basis for departure in an unusual case.

The penological purposes of sentencing include punishment, 18 U.S.C. § 3553(a)(2)(A). Loss of employment, tenure and pension rights are severe punishments, in some instances perhaps even greater than a prison sentence and fine. When a defendant receives an extraordinarily severe additional punishment, a district court judge might well determine that such additional punishment justifies some reduction in the presumed Guideline sentence so that a downward departure is necessary in order to ensure that the <u>total</u> punishment imposed upon the defendant is not unduly or disproportionately harsh.

Such an approach is consistent with the Guidelines goal that there be little or no disparity in punishment between two similarly situated individuals convicted of similar criminal conduct. U.S.S.G. Ch. 1, Pt.A(3). For instance, in the case of an attorney who is disbarred upon his or her

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be granted, we do believe that there are special situations, as the court found here, that make a prisoner especially vulnerable so that a downward departure is justified. *See United States v. Lara*, 905 F.2d 599, 604 (2d Cir. 1990).

conviction with another defendant of felony assault on a federal officer (even though the crime was wholly unrelated to the practice of law), the court, in a proper exercise of its discretion, might downwardly depart in the case of the attorney. If the two defendants are convicted of the same crime, under the same circumstances, but only the attorney will suffer the severe punishment of the loss of a hard-earned professional license and the attendant means of livelihood, while the other will return to the work force with no such penalty, the court, we submit, should be permitted to consider that collateral consequence when making a departure determination so as to reach a fair and adequate punishment for the attorney which might be less in prison time, but equal or greater overall, than the punishment imposed upon the co-defendant.[5]

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[5] Similarly, a court should be able to consider deportation following incarceration as a basis for departure as an additional punishment. We submit that there is nothing in the Guidelines or commentary to indicate that the Sentencing Commission adequately considered deportation of a resident alien because of a conviction as a basis for a departure. *But see United States v. Restrepo*, 999 F.2d 640 (2d Cir. 1993) (fact that defendant would be deported following term of incarceration did not warrant downward departure).

Another example of an additional punishment that might provide a proper basis for a downward departure might be in a situation where a civil judgment, including an award of punitive damages, is awarded to the victim of the crime. Such additional punishment might provide grounds for a downward departure as to the fine imposed, for instance. See U.S.S.G. § 5E1.2, comment. note, appendix E (most frequently asked questions), question number 116.

Another factor relied upon by the sentencing court is the "spectre of unfairness" with respect to the successive state and federal prosecutions under the "dual sovereignty" doctrine[6] (Appendix, at 68a). The NACDL believes that the district court properly considered the successive prosecutions as a factor when determining to depart downward. Even if the district court could not consider the fact that petitioner was tried and acquitted in a similar state prosecution as a bar to the federal prosecution, it should be permitted to consider the prior prosecution as a factor mitigating the punishment. The district court properly found that there is a spectre of unfairness in subjecting a person to a lengthy criminal prosecution in state court in which he was acquitted, thereby permitting him to obtain some relief in the form of a sense of repose, and then subjecting him to the trauma of a second trial by prosecuting him in the federal arena for the same conduct.

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[6] Whether the dual sovereignty exception to the Double Jeopardy Clause is still viable has been questioned recently by the Second Circuit. *See United States v. All Assets of G.P.S. Automotive Corp.*, Slip Op. No. 94-6115, at 7495 n.8 (2d Cir. Sept. 18, 1995) (questioning the viability of the dual sovereignty doctrine since the Supreme Court has not had occasion to apply the doctrine in the context of successive state-federal prosecutions since the Double Jeopardy Clause of the Fifth Amendment was found applicable to the states and noting that "[s]imilar doctrines premised on distinctions between federal and state sovereignty that had developed in connection with the Fourth Amendment and the Self-Incrimination Clause of the Fifth Amendment were eliminated after these constitutional provisions were held applicable to the states").

In some situations, the Sentencing Commission has recognized that factors that do not rise to a complete defense to a charge, such as duress, may nevertheless justify a downward departure. *See* U.S.S.G. §§ 5K2.12 (duress or coercion), 5K2.13 (diminished capacity), 5G1.3, comment. n.2 (relevant conduct). Indeed this Court has recognized that the harshness of the result in a case implicating double jeopardy concerns but not dismissable on double jeopardy grounds might be amerliorated by a downward departure. *Witte v. United States*, -- U.S. --, 115 S. Ct. 2199, 2208-09 (1995).

The district court also departed downward five levels based upon a finding that the victim's wrongful conduct contributed significantly to provoking the defendant's offense behavior. (Appendix, at 70a.) The NACDL believes that the sentencing court correctly determined that the victim provocation departure was applicable in this case. *See* U.S.S.G. § 5K2.10 ("If the victim's wrongful conduct contributed significantly to provoking the offense behavior, the court may reduce the sentence below the guideline range to reflect the nature and circumstances of the offense."). As a matter of law, contrary to the appellate court's interpretation of the Guidelines section, the victim provocation departure is applicable to this case, inasmuch as the Guidelines do not exclude police officers as a class from the application of the victim provocation departure. *See* U.S.S.G. § 5K2.10. Indeed, there are no exceptions to the application of the victim's conduct departure. The Sentencing Commission simply states that this departure might not be appropriate in cases involving sexual abuse or non-violent crimes. *See* U.S.S.G. § 5K2.10, comment.

Further, the court of appeals appeared to confuse provocation with justification. Unlike justification, which

might be a complete defense to criminality because some mental or psychological condition blocks the formation of the requisite criminal intent, *see Tison v. Arizona*, 456 U.S. 107, 133, n.40, 102 S. Ct. 1558, 1574, n.40 (1982) (noting various justification defenses under various state laws), *United States v. Erskine*, 588 F.2d 721 (9th Cir. 1978), provocation is merely a mitigating circumstance recognizing that there is less venality on the part of a defendant provoked into committing a wrongful act than one who acts without any provocation.

The circuit court's seeming belief that provocation can be easily terminated defies human nature. Provocation, like entrapment, exists in a continuum -- it does not necessarily stop merely because the instigator ceases to act. *See Jacobson v. United States*, 503 U.S. 540, 112 S. Ct. 1535 (1992) (finding entrapment as a matter of law even though defendant at time of crime, but not time of initial contact with government agents, was predisposed to commit crime). In both situations, one's will or ability to conform to the law can be overcome by another's misconduct. Once provoked, or once entrapped, the defendant's state of mind has been altered, sometimes irretrievably. Except perhaps where there is some significant attenuation, the provocation provides the impetus for a defendant's acts, even if the acts go beyond legitimate means. Thus, provocation as a mitigating factor should not be limited temporally to activities prior to or just following the termination of the provoking conduct, but rather only when there is no causal connection between the provocation and the crime.

For example, if a federal corrections officer were to constantly taunt a prisoner with racial slurs and physically provocative conduct, and then one day the prisoner, although not taunted that day, in fury and retaliation strikes the guard, the prisoner's conduct, while clearly wrongful

and not legally justified, might be considered for Guidelines purposes the result of provocation. The sole example given in U.S.S.G. § 5K2.10 itself suggests that earlier provocation might mitigate a crime so that a downward departure is warranted. *See* U.S.S.G. § 5K2.10, comment. The example states "an extended course of provocation and harassment might lead a defendant to steal or destroy property in retaliation." Certainly, this example is not limited to situations where the defendant steals or destroys property contemporaneously with or immediately after the provocation.

In sum, the NACDL believes that an appellate court should give due respect to a sentencing court's departure decision "in a spirit of humility occasioned by not having participated in what has gone before." *Founding Church of Scientology of Wash. D.C., Inc. v. Webster*, 802 F.2d 1448, 1457 (D.C. Cir.) (applying discretionary standard to district court's evidentiary decisions), *cert. denied*, 484 U.S. 871, 108 S. Ct. 199 (1986). As the title "Guidelines" itself implies, the Guidelines should be a guide, not a set of commandments, for the sentencing court to follow when determining the appropriate sentence. The NACDL supports a uniform discretionary standard of limited appellate review of departure decisions, which would be consistent with the spirit and the letter of the Guidelines.

CONCLUSION

For the foregoing reasons, the NACDL respectfully requests that the Court reverse the Court of Appeals for the Ninth Circuit and, in so doing, establish a uniform standard of limited appellate review of district court decisions to depart from the Guidelines in the "unusual" or "atypical" case based upon a single factor or a combination of factors.

Dated: New York, New York
November 9, 1995

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